IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 670

ERNEST PERKINS, ET AL., APPELLANT,

v.

L. S. MATTHEWS, MAYOR OF THE CITY OF CANTON, ET AL., APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

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Docket Entries

Date

5-1-69—Complaint, Original and 19 copies filed.

5-1-69—Notice of Motion with Motion for Temporary Restraining Order attached, original and 19 copies filed. Notice of Motion for 5-9-69, Jackson, Miss.

5-1-69—Notice of Motion with Motion for Preliminary Injunction attached, original and 19 copies filed. Notice of motion for 5-9-69, Jackson, Miss.

5-2-69—Summons, original and 15 copies, copies having attached thereto copy of complaint, Notice of Motion with Motion for Temporary Restraining Order attached, and Notice of Motion with Motion for Preliminary Injunction attached, issued and handed U.S. marshal.

5-6-69—Marshal's return on Summons executed as to Glynn Cook, R. H. Shackleford, Jr., Amos Dowdle, Jr., Joe Iupe, Earl B. Goolsby, Jr., William B. Crawford, L. H. Johnson, Hermit Jones, by delivering to Mr. R. L. Goza, City Attorney of City of Canton, copy of summons and complaint, and on C.F. Riddell, R.H. Holmes, Gus Noble, Mack Ragsdale, Rob Dow, by delivering to R.H. Holmes, Chairman of Democratic Municipal Executive Committee of City of Canton, and on Dr. G.A. Carmichael by personally delivering to him, filed.

5-6-69—Marshal's return on summons executed as to L.S. Matthews, filed.

Date

5-8-69—Notice of hearing Motion for Temporary Restraining Order for 5-9-69, Biloxi, Miss., with certificate of service, filed.

5-8-69—James A. Lewis' return on subpoena to produce document or object executed as to W. A. Sims, Chancery Clerk, Madison County, filed.

5-8-69—James A. Lewis' return on subpoena to produce document or object executed as to Mrs. Georgia L. Cobb, City Clerk of Canton, Miss., filed.

5-12-69—Opinion of the Court, filed. (Copy mailed Robert L. Goza and James A. Lewis 5-13-69)

5-12-69—TEMPORARY RESTRAINING ORDER: Municipal elections for City of Canton for 5-13 and 5-20, 1969 and municipal general elections for 6-3-69 restrained until further order; Plaintiffs to deposit with Clerk bond in amount of $2,500.00. Filed and entered OB 1969, P. 511-512. (copy mailed James A. Lewis 5-13-69) Bond deposited 5-12-69.

5-12-69—Copy of TRO mailed R.L. Goza from Biloxi certified mail return receipt requested.

5-9-69—EXHIBITS: A & B Joint Exhibits; P-1 thru P-8; filed.

5-19-69—Designation of Hon. James P. Coleman, U.S. Circuit Judge, Hon. William Harold Cox and Hon. Walter L. Nixon, Jr., U.S. District Judges for the Southern District of Mississippi, signed by Judge John R. Brown, Chief Judge of the Fifth Circuit, to hear and determine the action, filed and entered OB 1969, Pages 529-530.

Date

5-19-69—Copy of Complaint, temporary restraining order and designation mailed Judge Cox, Judge Nixon and Judge Coleman.

5-26-69—Answer of Defendants filed.

5-30-69—Motion of plaintiffs for leave to file Amendment to Complaint and Notice of motion for hearing at Jackson at 9:00 A.M. on 5-30-69, with certificate of service, filed.

5-30-69—ORDER: that amendment attached hereto be incorporated in the Complaint and that a copy thereof be served upon Robert L. Goza as sufficient service and notice to all defendants, filed and entered OB 1969, Page 553. (Copy handed attorneys of record by Sue Richmond).

5-30-69—Amendment to Complaint, filed. (Copy handed attorney Robert L. Goza by Sue Richmond).

6-2-69—EXHIBITS: P-1 through P-7; D-1, filed.

7-17-69—OPINION: Judgment may be entered by any Judge of the Court, for the Court, dissolving the temporary injunction and dismissing the complaint, filed. (Copy mailed attorneys Lewis and Goza; copy mailed Judges Nixon and Coleman. Anne Crews stated she retained conformed copy for Judge Cox)

7-24-69—JUDGMENT of 3-Judge Court: Complaint dismissed with prejudice at cost of Plaintiffs; cash bond of $2,500 paid into registry by Plaintiffs condemned for payment of damages sustained by defendants, amount to be determined after hear-

Date

ing before Judge Harold Cox; Temporary restraining order dissolved and defendants given full power and authority to conduct municipals elections in accordance with this opinion. Filed and entered OB 1969, Pages 791-792. (copies mailed attorneys of record. A. Crews stated copies had been mailed Judges)

7-24-69—Final J.S. 6 Card.

7-30-69—Plaintiffs' notice of appeal to Supreme Court of United States from judgment of U.S. District Court entered 7-18-69 dismissing complaint, with certificate of service, filed.

7-31-69—Order retaining original papers and allowing appellant 10 days in which to file designation of those parts of record in addition to copy of docket entries to be forwarded by the Clerk of this court—filed and entered OB 1969 P 824. Copy of above order mailed to Attys. of record.

8-12-69—Appellant's designation of record with certificate of service, filed.

9-8-69—Court Reporter's Transcript, filed.

9-9-69—Motion of Plaintiffs to stay judgment pending appeal, filed.

9-9-69—Motion of Plaintiffs to transmit original exhibits to Court of Appeals or in the alternative for an order authorizing Clerk to release said exhibits to appellants for purpose of reproducing them for inclusion in record.

Date

9-9-69—Plaintiff's notice of two above motions for 9-12-69 at Biloxi, Miss., filed.

9-12-69—Court Reporter's Transcript of proceedings had on 6-2-69, filed.

9-23-69—ORDER: Motion for a partial stay and to restrain the holding of the elections is denied without prejudice to the plaintiffs-appellants' right, in the event the judgment of this court is reversed to apply to this court for an order setting the elections aside. Filed and entered OB 1969, P. 982. Copy mailed James A. Lewis and R.L. Goza.

9-23-69—ORDER: Clerk authorized to transmit maps and photographs introduced as exhibits to Clerk of Supreme Court of U.S. in original form and original record shall be returned to the Clerk of this court upon completion of appeal. Filed and entered OB 1969, P. 981. Copy mailed James A. Lewis and R. L. Goza.

A True Copy, I Hereby Certify.

ROBERT C. THOMAS,
Clerk

By: J. NALL
Deputy Clerk

Filed May 1, 1969

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION No. 4464

ERNEST PERKINS, JOHN NICHOLS, ROBERT CHINN, CHARLES HARRIS, JR., FLONZIE GOODLOE, and VERA COLLINS, on their behalf and on behalf of all others similarly situated, *Plaintiffs*

v.

L. S. MATTHEWS, Mayor of the City of Canton; GLYNN COOK, AMOS DOWDLE, JR., EARL B. GOOLSBY, SR., L. H. JOHNSON and HERMIT JONES, Aldermen of the City of Canton; C. F. RIDDELL, R. H. HOLMES, DR. G. A. CARMICHAEL, GUS NOBLE, MACK RAGSDALE and ROB DOW, Democratic municipal executive committee of the City of Canton; and R. H. SHACKLEFORD, JR., JOE IUPE, and WILLIAM B. CRAWFORD, municipal election commission of the City of Canton, *Defendants*

Complaint

1. This is a civil action, pursuant to 42 U.S.C. §§ 1973c and 1983, for declaratory and injunctive relief against defendants' 1966 and 1968 extensions of the municipal boundaries of the City of Canton, Mississippi, to include a substantial number of additional white voters, and against defendants' selection of polling places for the May and June 1969 municipal primary and general elections, on grounds that the boundary extension and the selection of polling places each is a change in practice and procedure with respect to voting in a political subdivision covered by 42 U.S.C. § 1973b(a) and may not be enforced without compliance with 42 U.S.C. § 1973c, and on grounds that the boundary extension and the selection of polling places deny or abridge plaintiffs' right to vote and have their votes

counted, in violation of the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

2. Jurisdiction of this Court is based on 28 U.S.C. §§ 1343 (3)(4), 1973c and 2201. A court of three judges is required by 42 U.S.C. § 1973c.

FIRST COUNT

3. Plaintiff Ernest Perkins is a qualified elector and candidate for Alderman in the Democratic municipal primary election in Canton to be held May 13, 1969. Plaintiff John Nichols is a qualified elector and independent candidate for Mayor in the municipal general election in Canton to be held June 3, 1969. Plaintiffs Robert Chinn and Charles Harris, Jr., are qualified electors and independent candidates for Alderman in the municipal general election in Canton to be held June 3, 1969. Plaintiff Flonzie Goodloe is a qualified elector in Canton. Plaintiff Vera Collins is a qualified elector in Madison County. She lives outside Canton, next to the area containing white voters who were included by the 1966 and 1968 extension of municipal boundaries. All plaintiffs are black citizens of the United States.

4. Plaintiffs sue on behalf of themselves and all others similarly situated. The class is so numerous that joinder of all members is impracticable; questions of law and fact are common to the class; plaintiffs' claims and defenses are typical of the class; plaintiffs fairly and adequately protect the interests of the class; defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

5. Defendant L. S. Mathews is the Mayor and Defendants Glynn Cook, Amos Dowdle, Jr., Earl B. Goolsby, Sr., L. H. Johnson and Hermit A. Jones are the Aldermen of the City of Canton, Mississippi.

6. Defendants C. F. Riddell, R. H. Holmes, Dr. G. A. Carmichael, Gus Noble, Mack Ragsdale and Rob Dow are the Democratic municipal executive committee of Canton, Mississippi.

7. Defendants R. H. Shackleford, Jr., Joe Iupe, and William B. Crawford are the municipal election commission of Canton, Mississippi.

8. The defendants in paragraph 5 above passed the 1966 and 1968 ordinances extending the municipal boundaries to draw a substantial number of additional white voters into Canton.

9. This boundary extension was put into effect in accordance with the provisions of the Mississippi Code and is presently in effect for the May and June 1969 municipal primary and general elections.

10. The defendants in paragraph 6 are responsible for the conduct of the May 1969 municipal Democratic primary election. They will use the 1966 and 1968 municipal boundary extension in determining who may vote in that election.

11. The defendants in paragraph 7 are responsible for the conduct of the June 1969 municipal general election. They will use the 1966 and 1968 municipal boundary extension in determining who may vote in that election.

12. Prior to the Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq., less than 200 black citizens of the City of Canton, Mississippi, were qualified electors. Since the municipal elections of 1965, a great number of black citizens of the City of Canton have become qualified electors. Now more than 2000 black citizens are qualified electors of Canton. The May and June 1969 municipal primary and general elections are the first opportunities in this century for the vast majority of black citizens of Canton to participate in selecting governing officials of their city.

13. The 1966 and 1968 boundary extension substantially altered the racial composition of the municipal populace

and electorate. A large number of white voters were included in the city. Upon information and belief, no black voters were included. The boundary lines were drawn in such a manner as to pull in white voters, keep out black voters, and dilute the effectiveness of the vote of the newly-enfranchised black citizens.

14. The boundary extension has the purpose and effect of racial discrimination, denying plaintiffs equal protection of the laws and due process of law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

15. The boundary extension has the purpose and effect of denying, abridging and diluting the right to vote of plaintiffs and their class on grounds of race, in violation of the Fifteenth Amendment to the Constitution of the United States.

16. The City of Canton, Mississippi, is a political subdivision with respect to which the prohibitions of 42 U.S.C. § 1973b(a) are in effect.

17. The 1966 and 1968 boundary extension is a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." 42 U.S.C. § 1973c.

18. Defendants have not complied with 42 U.S.C. § 1973c, in that they have not obtained a declaratory judgment in the United States District Court for the District of Columbia that the qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, nor have defendants submitted said qualification, prerequisite, standard, practice or procedure to the Attorney General of the United States.

19. Thus defendants may not put the 1966 and 1968 boundary changes into effect for purposes of the May and June 1969 municipal primary and general elections.

SECOND COUNT

20. Plaintiffs repeat and reallege the allegations of paragraphs 3, 4, 5, 6, 7 and 12 above.

21. Defendants Mayor and Aldermen with defendants Democratic municipal executive committee plan to hold the May 1969 municipal primary in the following polling places:

Ward 1	Sacred Heart Parish
Ward 2	City Hall
Ward 3	Madison County Jail
Ward 4	King Lumber Company

22. Defendants Mayor and Alderman with defendants municipal election commission plan to hold the June 1969 municipal general election in the polling places as set out in paragraph 21, above.

23. Except for the use of City Hall for Ward 2 in the 1968 municipal bond election, none of these places has been used in any recent municipal election. Prior municipal elections have been held at the following polling places:

WARD 1

1953	Old City Hall
1957	Old City Hall
1961	Old City Hall
1965	Employment Office
1968	Employment Office
1969 (planned)	Sacred Heart Parish

WARD 2

1953	First National Bank
1957	First National Bank
1961	First National Bank
1965	First National Bank
1968	City Hall
1969 (planned)	City Hall

WARD 3

1953	Canton Exchange Bank
1957	Canton Exchange Bank
1961	Canton Exchange Bank
1965	Canton Exchange Bank
1968	Shackleford Building
1969 (planned)	Madison County Jail

WARD 4

1953	Court House
1957	Court House
1961	Court House
1965	Court House
1968	Court House
1969 (planned)	King Lumber Company

24. The polling places for the May and June 1969 municipal primary and general elections are inadequate and inaccessible and have the purpose and effect of reducing voting by black citizens.

25. Defendants' selection of polling places has the purpose and effect of racial discrimination, in violation of the guarantees in the Fourteenth Amendment to the Constitution of the United States of due process of law and equal protection of the laws.

26. Defendants' selection of polling places has the purpose and effect of denying, abridging, reducing and diluting the right to vote of black citizens on account of race, in violation of the Fifteenth Amendment to the Constitution of the United States.

27. Plaintiffs repeat and reallege the allegations of paragraphs 21, 22 and 23 herein.

28. Defendants' selection of polling places may not be put into effect for the May and June 1969 municipal primary and general elections.

29. Plaintiffs will suffer irreparable injury, without adequate remedy at law, if the May and June 1969 municipal Democratic primary and general elections are held with the electorate substantially altered by the 1966 and 1968 inclusion of white voters and with the polling places as now planned. An injunction is the only appropriate remedy to restrain the illegal holding of this election.

WHEREFORE, plaintiffs pray:

1. That a Court of three judges be convened;

2. That upon hearing the Court grant declaratory relief and a preliminary and permanent injunction restraining defendants from enforcing the 1966 and 1968 boundary extension and the proposed polling places for the May and June 1969 municipal primary and general elections, on grounds of violation of the Fourteenth and Fifteenth Amendments to the Constitution of the United States and of 42 U.S.C. § 1973c;

3. That pending the hearing of this matter the District Court prevent irreparable damage by restraining the May 1969 municipal primary elections if they are to be conducted at the proposed polling places with voters from the area added by defendants' 1966 and 1968 boundary extension;

4. That this Court grant costs and reasonable attorneys' fees to plaintiffs; and

5. That this Court grant such further relief as may be necessary to protect plaintiffs' rights.

Respectfully submitted,

ARMAND DERFNER
JAMES A. LEWIS
603 North Farish Street
Jackson, Mississippi
Attorneys for Plaintiffs

April 30, 1969

STATE OF MISSISSIPPI
COUNTY OF HINDS

VERIFICATION

I am one of the plaintiffs herein;

I have read the attached complaint, and it is true; as to the matters alleged upon information and belief, I believe they are true.

ROBERT CHINN

Sworn to and subscribed before me, this 30th day of April, 1969.

SARAH BROWN SMITH

My Commission Expires Aug. 31, 1970.

Filed May 12, 1969

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action Number 4464

Oral Opinion of the Court

This is an action brought by Plaintiffs who are all Negroes and candidates for City offices in the City of Canton, Mississippi, against the Mayor and Board of Aldermen of the City of Canton, the Democratic Municipal Executive Committee of the City of Canton and the Municipal Election Commission of the City of Canton, Mississippi, based on 42 U.S.C. Section 1973 (C) and 1983 for declaratory and injunctive relief against the Defendants' 1966 and 1968 extensions of the Municipal Boundaries of the City of Canton, Mississippi, to include a substantial number of additional, as alleged, white voters and against Defendants' selection of polling places for the May and June 1969 Municipal Primary and General Elections, on the grounds that the

boundary extension and the selection of polling places each is a change in practice and procedure with respect to voting in a political subdivision covered by 42 U.S.C. Section 1963 B (a) and may not be enforced with 42 U.S.C. 1973 C and on grounds that the boundary extension and the selection of polling places deny or abridge Plaintiffs' right to vote and have their vote counted in violation of the Fourteenth and Fifteenth Amendments to the Constitution of the United States. Jurisdiction of this Court is based on 28 U.S.C. Sections 1343 (3, 4), Section 1973 C and Section 2201. Three Judge Court has been requested as required by 42 U.S.C. 1973 C and this request has been sent by this Court to the Chief Judge of the Court of Appeals for the Fifth Circuit asking that a three judge court be designated to hear this matter, that is, the declaratory judgment and injunctive features thereof. This Court today is hearing this motion for temporary restraining order which was filed and noticed by the Plaintiffs or Petitioners herein, and the only question before this court at this time is whether or not irreparable injury would be caused Plaintiffs if the temporary restraining order were not issued pending the hearing of this matter before a Three Judge Court as required by law and as set forth in the recent case of Allen v. State Board of Elections, Et Al, which was decided by the unanimous United States Supreme Court through Chief Justice Earl Warren on March 3, 1969, which was a case that emanated from the State of Mississippi and which involved, among other things, the county-wide voting for all members of boards of supervisors in various counties as authorized by the Mississippi Legislature and which changed the office of the election commissioners for each county from an appointive to an elective office, and also dealt with absentee voting.

The Court, having heard testimony and arguments of counsel and having considered the pleadings and exhibits and all other evidence in this case finds that it has jurisdiction of this matter for determining the question of

temporary restraining order and finds that the City of Canton in 1966 and in 1968 extended its municipal boundaries to include additional areas with additional voters residing therein, and finds that there is no proof that these extensions were enacted or put into effect by the City of Canton for the purpose of denying anyone any voting right or to deny anyone any right guaranteed by the Fourteenth and Fifteenth Amendment of the United States Constitution, however the case of Allen versus State Board of Elections held that it is not the function or prerogative of this Court, even if it were now sitting as a three judge court, to determine the motive of the City in extending its boundary. The only questions to be decided by this three judge court in the final analysis, the three judge court to be designated, is whether or not the State of Mississippi or any of its political subdivisions have acted in such a way as to cause or constitute a voting qualification or prerequisite to voting or standard, practice or procedure with respect to voting within the meaning of Section 5 of the Voting Rights Act of 1965, which changed the situation that existed as of November 1, 1964, and whether or not prior to doing so the City had filed a request for declaratory judgment with the United States District Court for the District of Columbia or asked for approval of the Attorney General of the United States as required by Section 1973. It is stipulated that the City did not take either one of this actions, therefore the only questions before this court at this particular time are whether or not the extension of the boundary of the City of Canton, Mississippi constituted an act or enactment which changed or affected the voting qualifications or prerequisite to voting or standard, practice or procedure with respect to voting within the meaning of Section 5 of the Voting Rights Alt of 1965. And if the Court finds this to be the case, that is, the three judge court to be designated, then in that event it will have no alternative but to grant the relief requested, in part at least.

The Court finds that the extension of the boundaries of the City of Canton, a political subdivision of the State of Mississippi, was such an action to be comparable to the authorization by legislative enactment of the State of Mississippi, of county wide voting on boards of supervisors within certain counties which has been held by the United States Supreme Court to constitute the prohibited action of Section 5 of the Voting Rights Act of 1965.

Therefore the Court finds and is of the opinion that extension of the boundaries of the City of Canton, Mississippi were such enactments or actions which did affect or change the standard, practice or procedure with respect to voting that existed on November 1, 1964 in the City of Canton, Mississippi.

The Court further finds that at least one the Plaintiffs or Petitioners, namely, Ernest Perkins, is a candidate in the Democratic Primate for alderman for Ward Three of the City of Canton, and that the other plaintiffs are independent candidates who would be affected at least indirectly through the results, or by the results of the Democratic Primary which would select their opponents in the General Election. Ernest Perkins would be directly affected by the holding of said Democratic Primary elections on this coming Tuesday, May 13, 1969.

The Court therefore finds that Section 1973 of 42 U.S.C. were not complied with and therefore, under Section 5 of the Voting Rights Act of 1965, that there was a change in the standard, practice or procedure as set forth therein without the approval of the Attorney General nor the United States District Court for the District of Columbia. However, this matter is to be finally determined by the three judge court and this court does not purport to substitute its judgment at this time for the three judge court nor to speak finally with respect to this court's opinion on this matter, but does find that there is such a question present and such a probability that the three judge court

would so find that to deny a temporary restraining order at this time would cause irreparable harm and injury, not only to Plaintiffs but to other candidates in said election, to the electorate or qualified voters.

This court finds that Plaintiffs are not entitled to the relief requested with respect to enjoining or temporarily restraining of the Democratic Primary by prohibiting those in the newly annexed areas from voting and allowing the primary election to be held through the casting of ballots by only qualified electors residing within the City of Canton, November 1, 1964. It is impossible to determine at this late date, and incidentally the Court notes that this complaint and motion for temporary restraining order were not filed until May 1, 1969 and noticed for hearing on this date, and the Court has given to the Plaintiffs speedy hearing on the date that they requested, namely, today May 9th, 1969, that to give the Plaintiffs the relief that they requested as just previously stated would result in chaos, confusion, probable election contests and other legal action on the part of those who would be deprived and prevented from voting, particularly if the three judge court designated to hear this case decides that there was no violation of Section 5 or any change in the standard, practice or procedure with respect to voting within the meaning of Section 5 of the Voting Rights Act of 1965.

Therefore, it is the opinion of this court that the Democratic Municipal Election that was to be held in the City of Canton, Mississippi on May 13, 1969 will be enjoined in toto provided the Plaintiffs post a bond as required by law in the amount of $2,500.00, in view of the testimony given herein concerning the costs of advertisements, supplies, rental of voting machines by the City of Canton from Madison County.

Counsel for the Plaintiffs will prepare this order granting this temporary restraining order on this basis provided said bond is posted as required by law and by this order

and will submit it to the attorney for Defendants for approval as to form and present this order to the Court on Monday, May 12, 1969.

In the absence of the posting of the required bond, the Motion for Temporary Restraining Order will be overruled and denied.

The above and foregoing Opinion delivered in open court at the conclusion of the hearing on the above referred to Motion on May 8, 1969, and hereby ordered to be made a part of the record in this cause.

WALTER L. NIXON, JR.
United States District Judge

Filed May 12, 1969

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 4464

Temporary Restraining Order

Plaintiffs filed this civil action for relief against defendants' 1966 and 1968 extensions of the municipal boundaries of the City of Canton, Mississippi, and against defendants' selection of polling places for the May and June, 1969, municipal primary and general elections. Pending the convening of a three-judge court, as required by 42 U.S.C. Section 1973c, plaintiffs moved for a temporary restraining order, on May 9, 1969, this Court, acting through the single judge, heard plaintiffs' motion for a temporary restraining order, limited to the issue whether defendants' attempt to put the changes into effect violated Section 5 of the Voting Rights Act of 1965, 42 U.S.C. Section 1973c. Evidence and argument were presented by plaintiffs and defendants.

On the basis of that evidence, this Court, acting through the single judge, finds that the addition of substantial numbers of people and potential voters to the City of Canton by reason of the 1966 and 1968 annexations probably constitutes a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting digerent from that in force or effect on November 1, 1964," within the meaning of Section 5. The Court further finds that the City of Canton has not obtained a declaratory judgment from the United States District Court for the District of Columbia, to the effect that the changes will not have the effect of denying or abridging the right to vote on account of race or color, nor have the changes been submitted to the Attorney General of the United States. According to Section 5, a change not approved or submitted may not be enforced. Accordingly, it appears that there is a probability of plaintiffs' success on the merits of this case, and that a temporary restraining order is necessary to prevent irreparable injury to plaintiffs' rights.

IT IS THEREFORE ORDERED:

(1) The municipal primary elections of the City of Canton, Mississippi, scheduled for May 13 and 20, 1969, and the municipal general elections of the City of Canton, scheduled for June 3, 1969, are hereby restrained until further order of this Court;

(2) Plaintiffs shall deposit with the Clerk of this Court a bond in the amount of $2500.00, conditioned on payment of any costs incurred by the City of Canton if it is found to have been wrongfully restrained;

(3) The Clerk of this Court shall serve this Order on the defendants by sending a copy, registered mail, return receipt requested, to their attorney of record, R. L. Goza, Esq., 114 West Center Street, Canton, Mississippi, which

form of service shall be adequate notice binding on all the defendants.

Done this 12th day of May, 1969.

Walter L. Nixon, Jr.
United States District Judge

Approved as to form:

Armand Derfner 5/11/69
Counsel for plaintiffs Date

R. L. Goza Date
Counsel for defendants

Filed May 26, 1969

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 4464

Answer

Comes Now, L. S. Matthews, Mayor of the City of Canton; Glynn Cook, Amos Dowdle, Jr., Earl B. Goolsby, Sr., L. H. Johnson and Hermit Jones, Aldermen of the City of Canton; C. F. Riddell, R. H. Holmes, Dr. G. A. Carmichael, Gus Noble, Mack Ragsdale and Rob Dow, Democratic Municipal Executive Committee of the City of Canton; and R. H. Shackleford, Jr., Joe Iupe, and William B. Crawford, Municipal Election Commission of the City of Canton, defendants herein and for their answer to the complaint exhibited against them deny, allege and say this, to-wit:

FIRST DEFENSE

The defendants move the court to dismiss the complaint against them and for grounds, assign the following:

1. That the court does not have jurisdiction of the defendants or any of them.

2. That the court does not have jurisdiction of subject matter of the complaint.

3. That the complaint fails to state a cause of action under Section 5 of the Voting Rights Act of 1965.

4. That the actions of the defendants complained of do not come within the scope of Section 5 of the Voting Rights Act of 1965 and do not violate the Constitution of the United States or any amendment thereto, including the Fourteenth or Fifteenth Amendments.

WHEREFORE, the defendants pray that the complaint will be dismissed.

SECOND DEFENSE

AND NOW answering the introductory part of the complaint, the defendants say this, to-wit:

1. The defendants admit that part, of the introductory paragraph 1 of the complaint which states the nature of the complaint, but deny the same so far as it purports to allege facts.

2. The defendants deny the allegations contained in the introductory paragraph 2 of the complaint.

3. The defendants admit the allegations of paragraph 3 of the first count of the complaint.

4. The defendants deny the allegations contained in paragraph 4 of the first count of the complaint.

5. The defendants admit the allegations contained in paragraph 5 of the first count of the complaint.

6. The defendants admit the allegations contained in paragraph 6 of the first count of the complaint.

7. The defendants admit the allegations contained in paragraph 7 of the first count of the complaint.

8. In answering paragraph 8 of the first count of the complaint the defendants admit, that they passed ordinances in 1966 and 1968 extending the municipal boundaries of the City of Canton, Mississippi, but deny that the purpose or effect thereof was to draw a substantial number of white voters into the City, and aver that such expansions included members of both the Negro and white race. The defendants further aver that they passed an ordinance expanding the municipal boundaries which became effective in September of 1965, and which included only members of the colored or Negro race.

9. The defendants admit the allegations contained in paragraph 9 of the first count of the complaint, and aver that the expansion in 1965 will likewise be in effect for such primary and general elections.

10. The defendants named in paragraph 6 of the first count of the complaint admit that they are responsible for the conduct of the May 1969 municipal democratic primary election, but deny the remaining allegations of said paragraph and aver that all qualified electors of the City of Canton, including those residing within the areas annexed in 1965, 1966 and 1968 will be permitted to vote in such election.

11. The defendants named in paragraph 7 of the first count of the complaint admit that they are responsible for the conduct of the June 1969 municipal general election, but deny the remainder of said paragraph, and aver that all of the qualified electors of the City of Canton including those residing with the areas annexed thereto in 1965, 1966 and 1968 will be permitted to vote in such election.

12. The defendants deny the allegations contained in paragraph 12 of the first count of the complaint, except

that they admit there has been a substantial increase in the number of qualified electors of the City of Canton since the elections held in 1965, but aver that this has been the result of the normal growth of the municipality for the past four years and not the direct result of the aforesaid expansions.

13. The defendants deny the allegations contained in paragraph 13 of the first count of the complaint, and aver that the 1965 expansion included only members of the Negro race, and that the 1966 and 1968 expansions included members of both races, and that the racial composition of the municipal populace and electorate was not substantially altered; the defendants specifically deny that a large number of white voters were included in said expansions, and that the boundary lines were not drawn in such a manner as to include or exclude anyone on the basis of race; the defendants aver that all of such expansions were made in good faith and for reasons wholly unrelated to race, and pursuant to an over all, comprehensive plan for the expansion of the city as recommended by the city planners and formulated by the governing authorities as early as 1962; that all of such expansions were undertaken and made for the public convenience and necessity, and were reasonable and necessary based upon considerations of future residential, commercial and industrial growth and development, the need for municipal services, the economic and engineering feasibility of rendering such service and the public convenience and necessity; that each of said expansions was submitted to and ratified, confirmed and approved by the Chancery Court of Madison County, Mississippi as provided and required by the applicable statutes of the State of Mississippi that neither the purpose nor the effect thereof was to dilute the effectiveness of black citizens.

14. The defendants deny the allegations of paragraph 14 of count one of the complaint.

15. The defendants deny the allegations contained in paragraph 15 of count one of the complaint.

16. The defendants admit the allegations contained in paragraph 16 of count one of the complaint.

17. The allegations contained in paragraph 17 of count one of the complaint, constitute conclusions of the pleader and are not facts well pled, but that the defendant deny such conclusions, and aver that the qualifications and requisites to voting and the standards, practices and procedures with respect to voting in the City of Canton, Mississippi are the same as those in effect on November 1, 1964.

18. The defendants admit the allegations contained in paragraph 18 of the complaint, but deny that such expansions come with the purview of Section 5 of the Voting Rights Act of 1965, and aver that the defendants are not required to submit the same for approval under said Section since said expansion is in no way related to voting, or any qualification or requisite pertaining thereto.

19. The allegations of paragraph 19 of count one of the complaint constitute conclusions of the pleader and are not facts well pled, but the defendants deny such conclusions.

ANSWER TO SECOND COUNT

20. The defendants hereby incorporate herein each and everyone of their admissions, denials and averments contained in paragraphs 3, 4, 5, 6, 7 and 12 above.

21. The defendants admit the allegations contained in paragraph 21 of count two of the complaint.

22. The defendants admit the allegations contained in paragraph 22 of the second count of the complaint.

23. The defendants admit the allegations contained in paragraph 23 of the second count of the complaint, except that the planned polling place for ward 3 for use in the

1969 elections is erroneously described in the complaint as the Madison County Jail, when in fact it is a county owned building formerly occupied as a jail; and that the complaint erroneously describes the planned polling place for ward four as King Lumber Company, when in fact it was formerly occupied by such company but for the past four years has been and is now the administrative office building of the Canton Municipal Separate School District.

24. The defendants deny the allegations of paragraph 24 of the second count of the complaint, and aver that such polling places have adequate space and facilities, including rest room facilities, to accommodate, all voters and are large enough to permit the voters shelter in the event of inclement weather conditions, and have adequate means of ingress and egress to permit the efficient and expeditious conducting of the election without the voters having to wait in line for long and extended periods of time, as was the case in the polling places previously utilized; that all of the polling places to be used in said elections are readily accessible by all voters, and provide ample parking spaces for the convenience of the voters, without causing congested and hazardous traffic conditions, which have heretofore existed by utilizing the previous polling places; the defendants would further show that the polling places used in the 1965 municipal elections for wards two and three, are privately owned and that the owners thereof would not permit the use of the same in the coming elections, and that in addition, because of the increased number of electors registered in the City of Canton, and expected to participate in said elections, the polling places previously used are inadequate as to interior space and facilities as well as for parking accommodations; that therefore, new polling places had to be selected; that of the numerous locations considered, the chosen polling places represent the most adequate, spacious and convenient for the orderly and expeditious holding of said elections.

25. That paragraph 25 of the second count of the complaint does not contain facts well pled, but merely the conclusions of the pleader as to matters of law, but that the defendants deny such conclusions.

26. That paragraph 26 of the second count of the complaint does not contain facts well pled, but merely the conclusions of law and fact of the pleader, but that the defendants deny such conclusions.

27. The defendants incorporate herein by express reference thereto the denials, admissions and averments contained in paragraphs 21, 22 and 23, as hereinabove stated.

28. That paragraph 28 of the second count of the complaint does not contain facts well pled, but merely the conclusions of the pleader, but the defendants deny such conclusions.

29. The defendants deny the allegations contained in paragraph 29 of the second count of the complaint.

WHEREFORE, the defendants pray that the plaintiffs will be denied relief and that the complaint will be dismissed with prejudice to the plaintiffs.

Respectfully submitted,

/s/ R. L. GOZA
R. L. Goza
Goza, Case & Montgomery
Attorneys at Law
114 W. Center Street
Canton, Mississippi
Attorneys for the defendants

CERTIFICATE OF SERVICE

(omitted)

Filed May 30, 1969

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 4464

Order

Plaintiffs having moved to file an amendment to the Complaint, and it appearing that justice will be served by allowing the amendment,

IT IS HEREBY ORDERED that the amendment attached hereto be incorporated in the Complaint in this case, and that a copy thereof be served upon Robert L. Goza, Esquire, City Attorney, Canton, Mississippi, as sufficient service and notice to all defendants.

ORDERED this 30th day of May, 1969.

/s/ HAROLD COX
United States District Judge

Filed May 30, 1969

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 4464

Amendment to Complaint

Pursuant to leave of Court, add the following Third Count (including paragraphs 30-38) to the Complaint, and add the following clause 6 to the prayer for relief:

THIRD COUNT

30. Plaintiffs reallege the allegations of paragraphs 3, 4, 5, 6, 7 and 12 above.

31. Prior to 1969, four members of the Board of Aldermen in the City of Canton were elected by wards, *i.e.*, the voters of Ward 1 chose the alderman from Ward 1, etc.

32. Prior to 1962, this was done pursuant to statute:

> "In all municipalities operating under a code charter and having a population of less than ten thousand, according to the latest available federal census, there shall be five aldermen, which aldermen may be elected from the municipality at large, or in the discretion of the municipal authorities, the municipality may be divided into four wards, with one alderman to be elected from each ward and one from the municipality at large. In all such municipalities having a population of ten thousand, or more, according to the latest available federal census, there shall be seven aldermen, and the municipality shall be divided into six wards with one alderman to be elected from each ward and one from the municipality at large. The municipal authorities may establish as many voting precincts in each ward as may be necessary and desirable. The mayor of the municipality shall be elected from the municipality at large."

[Laws of 1950, Ch. 491, § 26, codified at Miss. Code of 1942, § 3374-36 (main volume).]

33. In 1962, this statute was amended to provide that all voters in the City would vote on all aldermen:

> "In all municipalities having a population of less than ten thousand (10,000), according to the latest available Federal Census, there shall be five (5) aldermen, which aldermen may be elected from the municipality at large, or in the discretion of the municipal authority, the municipality may be divided into four (4) wards, with one alderman to be selected from each ward and one from the municipality at large. On a

petition of twenty per cent (20%) of the qualified electors of any such municipality, the provisions of this Act as to whether or not the aldermen shall be elected from wards or from the city at large shall be determined by the vote of the majority of such qualified electors of such municipality voting in a special election called for that purpose. All aldermen shall be selected by vote of the entire electorate of the municipality. Those municipalities which determine to select one alderman from each of the four (4) wards shall select one from the candidates for alderman from each particular ward who shall be a resident of said ward by majority vote of the entire electorate of the municipality."

[Laws of 1962, Ch. 537, codified at Miss. Code of 1942, § 3374-36 (pocket part).]

34. Despite this statutory change, the 1965 municipal elections were conducted in the same manner as had previously been in effect under the pre-1962 law, *i.e.*, each ward elected its own aldermen.

35. Thus, individual ward elections were the "voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" in effect on and after November 1, 1964, within the meaning of 42 U.S.C. § 1973c.

36. On information and belief, the change to a system in which all city voters vote on each alderman has not been submitted to the Attorney General of the United States, nor has a declaratory judgment been obtained, as provided in 42 U.S.C. § 1973c.

37. The effect of the change will be to dilute the effectiveness of the black voters in the City of Canton, because there are heavy black majorities in Wards 3 and 4, while the city-wide registration is approximately evenly divided between black and white voters.

38. The change also violates plaintiffs' rights under the fourteenth and fifteenth amendments to the Constitution of the United States, by abridging their right to vote on grounds of race, and without due process, and by denying them equal protection of the laws.

* * *

6. That this Court order that the elections be held in accordance with the applicable provisions of state and federal law, but that the votes must be counted in the manner heretofore followed, *i.e.*, that only the votes of voters in Ward 1 be counted in determining the winner of the race for alderman in Ward 1, etc.

* * *

Respectfully submitted,

/s/ Armand Derfner
Armand Derfner
James A. Lewis
603 North Farish Street
Jackson, Mississippi
Attorneys for Plaintiffs

May 30, 1969.

Filed July 17, 1969

Opinion of Three-Judge Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 4464

Before COLEMAN, Circuit Judge, COX, Chief District Judge, and NIXON, District Judge.

COLEMAN, Circuit Judge.

1. THE CONTROVERSY

Twelve days prior to the date prescribed by law for the holding of Democratic municipal primaries throughout Mississippi, the plaintiffs filed their suit in the District Court. They complained that in 1966 and 1968 the City of Canton, Mississippi, had extended its municipal boundaries, that this caused a large number of white voters to be included in the City, and that this diluted the effectiveness of the vote of newly enfranchised black citizens. It was said that this, in the absence of a submission to the United States Attorney General or a declaratory judgment from the United States District Court for the District of Columbia, was a failure to comply with 42 U.S.C. § 1973c, the Voting Rights Act of 1965.[1]

The complaint also lodged a similar attack against the re-location of polling places within the four wards of the City of Canton.

May 8, 1969, pursuant to a hearing, Judge Nixon granted a temporary restraining order enjoining the holding of the municipal primaries scheduled for May 13 pending the

---

[1] Enacted August 6, 1965, applicable to changes with respect to any voting qualifications, standard practice, or procedure different to that in force on November 1, 1964.

disposition of the case on the merits. No election has been held and the encumbents are holding over in their respective offices, as provided by Mississippi law.

May 15, 1969, the Chief Judge of this Circuit constituted a Three-Judge Court composed of Judges Coleman, Cox, and Nixon.

By leave of the Court, May 30, 1969, the plaintiffs added a third count. This alleged that prior to 1969 four members of the Board of Aldermen in the City of Canton were elected by wards. The complaint acknowledged that in 1962, prior to the enactment of the Voting Rights Act of 1965, the Mississippi Legislature enacted a general statute, amending existing law, to provide that Aldermen in all municipalities of less than ten thousand population shall be elected by a vote of the entire electorate of the municipality, each required to reside in the ward which he proposed to represent on the town council.[2] It was alleged as a fact, which is the fact, that Canton did not comply with this law in the municipal elections of 1965, but followed the old statute, that is, the four aldermen were elected by wards.

In 1969, Canton proposed to comply with the 1962 statute. Plaintiffs say that this would be a change from the procedure in effect on November 1, 1964, and was thus invalid until either submitted to the Attorney General or to the United States District Court for the District of Columbia, as in other cases.

2. The Decision

We have heard this case on stipulations of the parties, exhibits, and oral testimony adduced in open court. We find and hold that under the facts of this case the contentions of the plaintiffs are not well taken, that the tem-

[2] Chapter 537, Laws of Mississippi of 1962, Mississippi Code of 1942, § 3374-36.

porary injunction should be dissolved, and the qualified electors of the City of Canton should be free to hold an election in compliance with the 1962 statute.

3. The Facts

Canton had a population of 9,707 at the last federal census. Approximately 5,900 are registered to vote in municipal elections.

Based on an average index of two voters per residence, which the plaintiffs do not challenge, the 1965 expansion of the Canton City limits brought into the City 46 black voters and no white voters. Plaintiffs do not attack this expansion. The 1966 expansion brought in 28 black voters and 64 white voters. The 1968 expansion brought in 8 black voters and 112 white voters. The sum total of the voters brought within the city limits by the three extensions would be 82 black voters and 176 white voters, or a majority of 94 white voters among those annexed in all three expansions.

One of the plaintiffs, who was a candidate for Mayor in the Democratic primary scheduled for May 13 [which office would have been voted upon city at large in any event] testified that as of January 12, 1969, there were 2052 white voters in Canton and 2794 black voters, a majority of 742 black. He further testified that between January 12 and February 3 approximately 800 white voters registered in the city and only 150 black voters registered. It is to be noted that the figure of 800 new white registrants as contrasted to only 150 black registrants was not supported by documentary evidence but represented the witness's best judgment after an observation of the registration books. If there were 800 new white registrants after January 12 only 176 could have come from the annexed areas, even if all had waited until then to register. In any event all the witnesses agreed that regardless of the 94 net gain in the white vote, brought about by the

expansions, the majority of the electorate in the City of Canton are black.

4. Conclusions of Law on the Applicability of the Act to the Expansions

We are therefore confronted with the question: Did Congress intend (in the affected states) to freeze municipalities to their existing boundaries, prohibiting any municipal expansion even though, as in this case, the annexations included a white majority of 94 in a total voting population of 6,000, not destroying a black majority?

We have been cited nothing to show that Congress either thought of such or intended it. Applying the full reach of the Act, Congress could not have intended such a result unless it were shown to be a stratagem deliberately designed to overturn a black majority at the municipal polls. In Canton, Mississippi, the black voters still had a majority of not less than 600 after the expansions were effected. It is significant that the first expansion brought in 46 black voters and no white voters at all. Moreover, the City has expended over three quarters of a million dollars bringing municipal services to the annexed area, including the all-black annexation of 1965.

We therefore hold that these annexations were not violative of the Voting Rights Act of 1965.[8]

5. Compliance with the Municipal Election Law of 1962

On March 26, 1962, the Supreme Court decided Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L. Ed. 2d 663. On May 24, 1962, the Mississippi Legislature, by and with the approval of the Governor, enacted Chapter 537 of the Laws of Mississippi of 1962, entitled "AN ACT pro-

[8] Under Mississippi Law, municipalities may neither expand nor contract their corporate limits at their unfettered discretion. To do either they must petition the Chancery Court, where any party in interest may object and litigate his objections. Mississippi Code 1942, § 3374-10, et seq.

viding for the city-wide election of all individuals comprising the governing authority of any municipality". The Act amended the previously existing § 3374-36, Mississippi Code of 1942, and concluded with the following language, not heretofore in the statute:

> "All aldermen shall be selected by vote of the entire electorate of the municipality. Those municipalities which determine to select one alderman from each ward shall select one of the candidates for alderman from each particular ward by a majority vote of the entire electorate of the municipality".

Plaintiffs do not attack the validity of this amendment. They say it should not be observed in Canton in 1969 because it was not observed in 1965.

This enactment preceded the Voter Rights Act of 1965 by a little over three years. It permitted the requirement that an alderman should reside in the ward he proposes to represent, but the choice is left to all the voters in the municipality, each having an equal voice in the selection of the governing authorities of the city. This complies with the Constitutional requirement of one man—one vote, Dusch v. Davis, 387 U.S. 112, 87 S.Ct. 1554, 18 L.Ed.2d 656 (1967).

We have previously pointed out that in the municipal elections of 1965 Canton did not comply with the 1962 law. The reasons for noncompliance are not shown. In any event, plaintiffs wish to continue the invalid 1965 procedure of allowing each ward to elect its alderman for the reason that in one ward Negro citizens are in the overwhelming majority, leaving them in the position, if they wished, of voting on racial considerations alone and thus having at least one Negro on the City Board.

If race alone is to govern the outcome of elections as well as the official acts of city legislative bodies, it is obvious that if the procedure desired by the plaintiffs were approved then the one Negro member of the Board would

always be outvoted by the four white members. His presence on the City Board would, in practical effect, amount to nothing beyond the presence of a black man who could always cast his dissenting vote. Since a majority of the voters in Canton are black it is equally true that under the 1962 Act the black voters have the power, if they wish to be influenced by race alone to elect an all black governing body.

We do not think, however, that this issue is to be decided by these considerations.

In the first place, the City of Canton should obey the one man—one vote rule. In the second, the 1962 Act antedates the Voting Rights Act of 1965, and could not have been enacted for the purpose of thwarting the latter. In the third, it is axiomatic that a violation of the law in the elections of 1965 does not justify continued violations. The City should comply with the law in 1969, regardless of whether it complied in 1965. Indeed, non-compliance in 1969 would invalidate the election if a challenge were to be raised. We are not impressed with the argument that Congress intended to freeze unlawful election procedures. Unlawful election procedure, insofar as the Fifteenth Amendment applies, is what the Act intends to stop. Moreover, the state statute requiring that aldermen be elected by all the voters of the municipality, instead of from individual wards, brings cities in compliance with the one man —one vote rule, leaving to all the inhabitants an equal voice in the election of their municipal officials, something which Congress could not abrogate without a Constitutional Amendment.

We are therefore of the opinion that the contentions of the plaintiffs on this issue are not due to be sustained.

6. The Change in Polling Places

We find no merit in the attack upon the changes made in the location of the polling places. The evidence on this issue is undisputed. The same number of polling places

will remain in each city ward. No voter will have to go outside his ward to vote. The changes were made necessary because one place did not have space for voting machines, two others had to be moved because they had been situated on private property (bank lobbies) and permission to use the space had been withdrawn, and another was moved out of the courthouse to a school building because facilities were more ample and the move eliminated any interference with sessions of the various courts sitting at the courthouse.

This opinion constitutes our findings of fact and conclusions of law in this case, Rule 52(a), Federal Rules of Civil Procedure.

Judgment may be entered by any Judge of the Court, for the Court, dissolving the temporary injunction and dismissing the complaint.

This July 17th, 1969.

/s/ Jas. P. Coleman
United States Circuit Judge

/s/ Harold Cox
United States Chief District Judge

/s/Walter L. Nixon, Jr.
United States District Judge

Filed July 24, 1969

Judgment of 3-Judge Court

Pursuant to and in accordance with the opinion of this Court herein, dated July 17, 1969, it is ordered, adjudged and decreed by the Court:

(1) That the complaint as amended of the plaintiffs is without merit and is dismissed with prejudice at the cost of the plaintiffs, to be taxed by the Clerk of this Court according to law;

(2) That the temporary restraining order granted herein on May 12, 1969 at the instance of the plaintiffs was improvidently granted, and the defendants were thus consequently wrongfully restrained from conducting their May 13 and May 20, 1969 primary elections and general election on June 3, 1969 for their municipal officers upon the plaintiffs posting, as they did, a cash bond in the amount of $2,500.00 with the Clerk of this Court, conditioned to pay all damages sustained by the occasioned the defendants as a result thereof. That said cash bond is hereby condemned for the payment of all damages sustained by the defendants as a result thereof and the amount of such damages shall be determined at a hearing before a single judge of this Court (Honorable William Harold Cox, United States District Judge) at a time and place later to be fixed at his direction; and said single judge of this Court is vested with the full and plenary power and authority to hear and decide such question and to enter a proper judgment thereon and order process, the same in all things as if such question were initially addressed to him alone; and that such award shall be and constitute the final judgment of this Court in this case;

(3) That the temporary restraining order herein dated May 12, 1969 is dissolved and abated and the defendants are expressly granted the full power and authority to con-

duct their municipal elections according to law in accordance with the opinion of this Court.

So Ordered, this July 18, A. D., 1969.

/s/ Jas. P. Coleman
United States Circuit Judge

/s/ Harold Cox
United States Chief District Judge

/s/Walter L. Nixon, Jr.
United States District Judge

Filed July 30, 1969

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 4464

Notice of Appeal

Please take notice that the plaintiffs hereby appeal to the Supreme Court of the United States, pursuant to 28 U.S.C. § 1253, from the judgment of this court entered July 18, 1969, dismissing the complaint.

Respectfully submitted,

/s/ Armand Derfner
Armand Derfner
James A. Lewis
Taunya L. Banks
603 North Farish Street
Jackson, Mississippi
Attorneys for Plaintiffs

Certificate of Service

(omitted)

Filed Aug. 12, 1969

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civ. No. 4464

Designation of Record

Come now appellants, pursuant to this Court's Order filed on July 31, 1969, and designate the following portions of the record to be certified to the Clerk of the Supreme Court of the United States:

1. Complaint (April 30, 1969)
2. Transcript of hearing on motion for temporary restraining order, including all exhibits (May 8, 1969)
3. Oral opinion granting temporary restraining order (May 8, 1969)
4. Temporary restraining order (May 12, 1969)
5. Answer (May 23, 1969)
6. Amendment to complaint, and order allowing amendment (May 30, 1969)
7. Transcript of trial, including all exhibits (June 2, 1969)
8. Answer to amendment to complaint (not filed)
9. Opinion (July 17, 1969)
10. Judgment (July 18, 1969)
11. Notice of appeal (July 30, 1969)

Respectfully submitted,

/s/Armand Derfner
Armand Derfner
James A. Lewis
Taunya L. Banks
603 North Farish Street
Jackson, Mississippi 39202

August 11, 1969

Certificate of Service

(Omitted)

Filed Sep. 9, 1969

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action 4464

Motion To Stay Judgment Pending Appeal

Come now the plaintiffs-appellants, having filed a notice of appeal to the Supreme Court of the United States from the judgment of this court dismissing the complaint with prejudice, and move that that judgment be stayed insofar as it allows the 1969 municipal elections to go forward in the City of Canton, and move further that the temporary restraining order previously granted be continued in effect until the Supreme Court of the United States acts in this matter or, in the alternative, that a temporary restraining order be granted until the court of three judges can grant an injunction pending appeal.

In support of this motion, plaintiffs-appellants would show that the defendants have ordered the elections to go forward beginning with the first primary on October 7, 1969; that gaining full relief after an election has already been will be difficult even if plaintiffs-appellants obtain a reversal, in view of the reluctance of courts to set aside elections, *see Allen* v. *Board of Elections*, 393 U.S. — (1969), and the resultant confusion to the voters; that plaintiffs-appellants believe they have a meritorious appeal; and that the corresponding injury by granting this motion will be slight, since plaintiffs-appellants expect to submit their jurisdictional statement and docket the appeal by September 15, 1969, which means the Supreme Court would, in the ordinary course, accept or decline jurisdiction by November 1, 1969.

For the above-stated reasons, plaintiffs-appellants move that the elections be delayed until the Supreme Court of the United States accepts or declines jurisdiction.

Respectfully submitted,

s/ ARMAND DERFNER
Armand Derfner
James A. Lewis
Taunya L. Banks
603 North Farish Street
Jackson, Mississippi
Attorneys for Appellants

September 5, 1969

Filed Sep. 23, 1969

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI SOUTHERN DIVISION

Civil Action No. 4464

Order

Plaintiffs-Appellants having moved to stay that portion of the judgment of dismissal which allows the elections in the City of Canton to go forward, and having moved to restrain the holding of those elections, and the court finding that the motion is not well taken,

IT IS HEREBY ORDERED that the motion for a partial stay and to restrain the holding of the elections is denied, without prejudice to the plaintiffs-appellants' right, in the event the judgment of this court is reversed, to apply to this court for an order setting the elections aside.

Ordered this 12 day of September, 1969.

/s/ JAS. P. COLEMAN
United States Circuit Judge

Excerpts From Transcript of Proceedings of May 9, 1969

[12] **Mr. Robert Chinn,**

was thereupon called as a witness on behalf of the Plaintiff, and having been duly sworn, testified on his oath as follows:

* * * * * * * * * *

[30] Q. Mr. Chinn, it has been stipulated that the most recent previous elections in Ward Three, that is the elections for officers every four years, '53, '57, 1961 and 1965, have all taken place in the Canton Exchange Bank and that the upcoming elections plan to take place in the Madison County Jail. Are you familiar with the location of the Canton Exchange Bank? A. Yes, I am.

Q. And where is that, in town? A. The Canton Exchange Bank is located right off the [31] square, it is on the square.

Q. The center square in town? A. That's right. On Peace Street on the right hand side, coming into town.

Q. And where is the Madison County Jail? A. The Madison County Jail is located around about four blocks over on Fulton Street.

By Mr. Goza:

If your Honor please, for the accuracy of the record, that building they refer to is not the Madison County Jail. It is a building formerly occupied by the Madison County Jail.

By Mr. Derfner:

The new Madison County Jail is not even in the City of Canton.

By Mr. Goza:

That is correct.

By Mr. Derfner: (continuing direct examination)

Q. And likewise the stipulation is that the previous general elections for Ward Four have all taken place at the courthouse and that the upcoming elections plan to take place at the King Lumber Company. Are you familiar with the location of the courthouse? A. Yes, I am.

Q. Where is that? A. Located on the square in the middle part of town.

[32] Q. And where is the King Lumber Company located? A. It is located out about Lincoln—let's see, out there in the saw mill area. In the saw mill quarter area. I could point it out on the map.

* * * * * * * * * *

[36] Q. I am showing you five photographs, Mr. Chinn and I ask you if you can identify them? A. This is the Old County Jail here, located on Fulton Street, Ward Three, where they are supposed to vote this time. This has never been used for voting.

Q. Are all of the pictures of the Old County Jail? A. This is another picture of the Old County Jail. This is another one, and this is another one and this also is another one.

By Mr. Derfner:

I would like those marked as Plaintiffs Exhibits One through Five and introduced into evidence.

* * * * * * * * * *

By the Court:

Let these five photographs be admitted in evidence and marked as one Exhibit, Plaintiff's Exhibit One.

[37] (Same Received in Evidence and Marked Exhibit P-1)

By Mr. Derfner: (continuing direct examination)

Q. Did you go inside that building, Mr. Chinn? A. I looked inside of it. I couldn't go inside because it was locked.

Q. What did you see inside? A. I seen screen doors laying on the floor and screen hanging all over the place.

Q. Did you notice the condition of the floor boards, either inside or out on the porch? A. Buckled up and loose.

Q. Have you ever been in that jail yourself? Inside that jail? A. I have

Q. When was that? A. In 1965.

Q. What were you there for? A. Picketing.

Q. What happened to the charges? A. The charges were dropped.

By the Court:

What has that got to do with this case, Counsel?

By Mr. Derfner:

I want to establish the witness' familiarity with the jail and at the same time I don't want his credibility as a witness [39] to be prejudiced by the fact that he has been in as a prisoner.

By the Court:

All right, let's proceed and let's get to the issues in this case. Stick to the issues in this case.

By Mr. Derfner: (continuing direct examination)

Q. Is that building roomy? A. No it is not roomy. The corridor in there is only around about four feet, I think. The hall.

Q. Are there any big rooms? A. The rooms are around about twelve by twelve.

Q. Is it well lit? A. No, it is not.

By the Court:

When were you last inside?

By the Witness:

Last inside in '65. I looked inside of it the other day, in one room.

By the Court:

Could you tell what the lighting condition was the other day in this buildings?

By the Witness:

It was in the daytime, nothing was being used in there and the lights wasn't on.

By Mr. Derfner: (continuing direct examination)

Q. Was there substantial sun light in the building? [40]
A. No.

Q. Of your knowledge, just answer this question yes or no, do you know if the black community in the City of Canton has an impression or reaction about that building?

By Mr. Goza:

Your Honor, we object to that question as calling for a conclusion of this witness.

By the Court:

Sustain the objection. * * *

* * * * * * * * * * *

By Mr. Derfner: (continuing direct examination)

Q. Has there been any public discussion or public meetings among the black citizens in the City of Canton and public statements in connection with that building or events in that building in the past year?

By Mr. Goza:

Your Honor, [41] we object to that as being irrelevant and based on hearsay.

By the Court:

Will you repeat that question—Counsel?

By Mr. Derfner:

The question was has there been either public discussions, public meetings or public statements in the black community of the City of Canton about that building in the past. I think, the relevance, your Honor, is when I complete the line of questioning, I think it will show that there is a definite fear and antagonism on the part of black people in the City of Canton which has been demonstrated by statements, meetings and discussions relating to event that have taken place in there, and therefore it would act as a significant deterrent on the willingness of people to go to that building to exercise as important a right as voting.

By Mr. Goza:

Your Honor, our objection is based on the fact that this witness may be permitted to testify about how he personally feels but it is stretching a point to say that he can get up here and testify as to what twenty-five hundred or twenty-six hundred colored voters feel.

By the Court:

I sustain the objection. He can testify as to his own personal feeling toward this matter.

By Mr. Derfner:

[42] May I make a proffer on this point, your Honor?

By the Court:

Yes, you may.

By Mr. Derfner:

The proffer is that if the witness were allowed to testify to answer the last question and the line of questioning developed from that, he would testify that as recently as last Fall there was a juvenile incarcerated in that jail for several weeks, that the juvenile's name was Cleo Clark, that the juvenile was finally released from jail on an order of Habeas Corpus granted by this Court; that that juvenile was mistreated or at least claims he was mistreated and it is the belief of many or most black people in the City of Canton, Mississippi, that he was in fact mistreated in the jail and by officials of the jail and that there were numerous public meetings including some of them attended by as many as five, six or seven hundred people in the City of Canton complaining about this treatment and voicing dissatisfaction with that building and all the events that had gone on in there. That the result of that, of those meetings was to start a movement of some sorts, including a selective buying campaign in the City of Canton and that many of the—many or most of the black citizens of the City of Canton are engaged in what might be called political activity or organizational activity which has grown out of events that took place in that building.

[43] By the Court:

To me, that would not be simple hearsay, it would be compounded hearsay and I will sustain the objection. Your offer is made.

By Mr. Derfner:

Thank you, Your Honor.

By the Court:

I might say that I am familiar with the Cleo Clark case. I am the one that turned him lose but I found no evidence

of mistreatment in that case. I found he was being held illegally, however.

By Mr. Derfner:

I ddin't mean to imply, Your Honor, that the Habeas Corpus was granted in relation to the mistreatment, it was on the grounds of custody.

By the Court:

All right.

By Mr. Derfner: (continuing direct examination)

Q. I am showing you four pictures, Mr. Chinn, and ask you if you can identify those pictures? A. This is the School Administration Building here that is going to be used. Ward Four, newly voting precinct.

Q. Have you heard that building referred to as the King Lumber Company, in recent times? A. Yes, sure.

[44] Q. And where have you heard or seen it referred to as the King Lumber Company? A. From all the folks that live out there, everybody that lives in the City and the County.

• • • • • • • • • • •

[54] Cross Examination

By Mr. Goza:

• • • • • • • • • • •

[58] Q. Do you know how many houses—you have testified from Plaintiff's Exhibit "A", as to the area which was annexed in 1966 and the number of houses that were in it as of last Monday when you counted them. How many houses were in that area [59] at the time of the annexation or in 1966? A. In terms of the first one or the last one?

Q. In 1966, the part east of town as shown on Exhibit "A". A. May I see those exhibits, please?

Q. If you need to use the pointer, you may do so. A. I would say approximately, in this area over here which has been newly developed, about three years, which would catch 1966, you said, didn't you? You said 1966?

Q. 1966. A. Approximately a hundred houses east of Canton and west of Forty-three, including those two areas, and behind Mr. A. C. Slaughter's store, down east, going towards Madison Woodwork.

Q. Did you count those houses in 1966 when this expansion became effective? A. I counted them.

Q. In 1966? A. No, not in 1966.

Q. Do you know how many houses were in that area in 1966? A. I don't know how many was in there in 1966, no.

• • • • • • • • • • •

[68] Q. Now, you have sought public office on two other [69] occasions, is that not correct? A. That's right.

Q. In what elections? In what years? A. In 1966 and 1967.

Q. Which year did you run for supervisor? A. In 1967.

Q. And you ran for Constable in 1966? A. That's right.

Q. State whether or not the City Hall of the City of Canton was used as a polling place in those elections by the County? A. The City Hall?

Q. The City Hall. A. The City Hall was used, the Courthouse was used and the Armory was used.

Q. So you are not down here telling the Court that this is the first time the City Hall has been used for a polling place? A. No, I am not saying this is the first time City Hall has been used. It is the County now. We are talking

about a County thing, right? You are talking about a County election?

Q. That was my question. State whether or not you participated in a City election in November of 1969, a bond election?

By the Court:

You mean Sixty-eight?

[70] By Mr. Goza:

Sixty-eight, excuse me, your Honor.

By the Witness:

Sixty-eight, I did.

By Mr. Goza: (continuing cross examination)

Q. State whether or not City Hall was used as a polling place at that election? A. As I recall the polling places where the bond issue was Shackleford Insurance, Courthouse the Employment Office—I believe City Hall.

Q. City Hall. And you participated in that election? A. I did.

. . . . . .

[72] Q. Are there any other members of the Colored Race seeking—running in the Democratic Primary? A. Yes, sir.

Q. Who is that? A. Mr. Cooper.

[73] Q. Is he a party to this lawsuit? A. In terms of name on petition?

Q. Right. A. No.

Q. Are there any other independent candidates of the colored race seeking election in the General Election who are not named in this Petition by name? A. One person.

Q. Who is that? A. Mr. Sam Young, for reasons, if you want me to explain.

Q. I want you to tell me whether he is or not, is what I want to know. A. He is not.

Q. What office is he seeking? A. Alderman from Ward Three.

By the Court:

As a Democrat?

By the Witness:

Independent.

. . . . . .

[74] Q. Where is the Parish Center in regard to the City Hall? A. Approximately twenty-five to fifty yards. Right across the street. It is in front of it.

Q. Where is the Old Jail building in regard to the City Hall? A. About two hundred yards behind the City Hall.

Q. In other words, all three of them are right there [75] together, are they not? A. All three of them are right there together.

. . . . . .

[79] Redirect Examination

By Mr. Derfner:

Q. Were the old polling places close together? A. They were.

Q. Are the new polling places close together? A. They are.

Q. Is King Lumber Company close to the other polling places? A. No.

Q. And where were the old polling places when they were close together? A. It was City Hall—in terms of the City election?

Q. You say they were all close together. Where were they grouped in one area? A. They were.

Q. Could you describe that area? A. Most of them were on the square.

Q. Courthouse square? [80] A. That's right.

. . . . . .

[82] **Mr. Gus Noble.**

was thereupon called as a witness, having been duly sworn, testified on his oath as follows, on behalf of the Defendants:

Direct Examination

By Mr. Goza:

Q. Please state your name to the Court? A. Gus Noble.

Q. Where do you live, Mr. Noble? A. 701 Kathy Circle, Canton, Mississippi.

Q. What is your business or occupation? A. My business is insurance and real estate at 118 North Liberty Street, Canton, Mississippi.

Q. How long have you engaged in the real estate business? A. For the last eighteen years.

Q. Do you hold any license from the State of Mississippi to engage in real estate? A. Yes, I do, a brokers license.

Q. How long have you been a licensed broker? A. About the last ten years, sir.

Q. What types of property—with which types of property do you deal? [83] A. All types, farm property, residential property and commercial property. Rental property.

Q. How long have you lived in the City of Canton? A. Other than my military career, sir, all my life.

Q. Are you familiar with its growth and expansion over the last ten years? A. Yes, I am.

Q. Did you serve on any—have you served on any type commission in the City of Canton in regard to growth and expansion of the City? A. Yes, sir, I was commissioner of the zoning and development commission for the City of Canton and Madison County.

Q. When was that? A. In 1959 to approximately 1963.

By the Court:

Mr. Goza, I would like to say this right now, the case of Allen versus State Board of Elections was decided unanimously by the United States Supreme Court on March 3,

1969 and limits this hearing to two issues. One, whether or not there has been a change by a state or any political subdivision in any of its laws which constitutes—enactment of which constitutes a voting qualification or prerequisite to voting or standard, practice or procedure with respect to voting within the meaning of Section Five of the Voting Rights Act of 1965 and which would or could affect by a dillution of voting power as well as an absolute [84] prohibition on casting a ballot and if so whether or not the political subdivision that made this change had secured from the District Court for the District of Columbia a declaratory judgment authorizing this change or had obtained the approval of the Attorney General of the United States and those are really the only issues before us at this time. That is the law as announced by the United States Supreme Court.

I think that under the law now, that the Defendants who make such a change without the authority must obtain that authority and must there prove before the United States District Court for the District of Columbia, or to the satisfaction of the Attorney General of the United States that the change that was made was not made for the purpose—that is, was not made in prohibition of Voting Rights Act of 1965, which the Courts have held was enacted to protect citizens' rights under the Fourteenth and Fifteenth Amendments to the United States Constitution.

I don't think that this court can now concern itself with or have the authority to make any determination in that regard at this time. I am not stating this or holding that the City of Canton had any ulterior motive or had anything in mind by these annexations to deprive any citizen of his vote or to dillute the voting rights of the Negro citizens of the City of Canton, but that's not, under the law now, since the recent decision of Allen versus Board of—State Board of Elections, [85] which was a Mississippi case, that is a matter that has to be either litigated before the United States District Court for the District of Colum-

bia, or a matter which has to be taken up with the Attorney General of the United States.

I can't say that I agree with the philosophy or the basis for the holding by the United States Supreme Court, but nevertheless I am certainly bound by it and I will never shirk my duty to follow it until the law is changed.

Therefore, I think we are getting ready to go into something now which is really not relevant at this particular time before this Court. This is a matter that must be presented under the—under 42 U.S.C. Section 1973 to the United States District Court for the District of Columbia, or to the Attorney General of the United States if his approval is sought in this regard and the only issues before this Court were whether or not the State or one of its political subdivisions, which is a city, an incorporated city, has changed its law or enacted a law or—let me use the precise language—shall enact or seek to administer any voting qualification or prerequisite or standard, practice or procedure with respect to voting different from that that was in effect and in force on November 1, 1964, and the Supreme Court in Allen versus the State Board of Elections held that this provision must be given a very liberal interpretation and that if there is any act done or any enactment by the State or any City within the State which would in any way involve [86] a change from the situation that existed on November 1, 1964 which could affect by a dillution of voting power the voting in any such subdivision of the state or political subdivision thereof which would possibly affect voting qualifications, prerequisites, standards, practice or procedure with respect to voting within the meaning of Section Five of the Voting Rights Act of 1965, then it became the duty and responsibility of the political subdivision to either obtain a declaratory judgment from the United States District Court for the District of Columbia or Attorney General of the United States to put that change into effect, and it has been stipulated that there has been no request or any act of the Attorney General nor any action filed in the United States District Court

for the District of Columbia, so the only question before the Court at this time, as I see it, is whether or not there was a change and secondly, whether or not this change in any way constituted a voting qualification or prerequisite to voting or standard, practice or procedure with respect to voting which did not exist on November 1, 1964. No other issue is before us at this particular time. The law specifically and clearly states that the burden is on the City in this particular instance.

By Mr. Goza: Yes, sir.

By the Court: To convince the Attorney General of the United States [87] or the District Court for the District of Columbia that the change in procedure or voting qualifications or standard or practice was not done for the purposes prohibited by and protected by the Section Five of the Voting Rights Act of 1965.

That is not a matter that this Court can determine. The only matter that this Court is called upon to determine now is whether or not there was such a change which would dillute or affect voting rights because of the change in standard, practice and procedure or voting qualifications, other than those or from those that existed on November 1, 1964.

So the Court is of the opinion that the matter that we are going into now, which I think you are trying to prove by that, is there was no ulterior motive—

By Mr. Goza: —That's correct.

By the Court: —or rather no illegal motive or motive to deny any citizen his right to vote or to dillute his vote, I don't think that that is a matter properly before the Court at this time.

By Mr. Goza: I believe you are correct, your Honor. The purpose of part of this was to show that these things were done in the ordinary course of business, so to speak, and done in good faith.

By the Court: I don't think they were done for any other reason. I [88] think they were done in good faith. I don't think they were done for any other reason, that I

have been done so far, I don't think they were done for the reason that the Plaintiffs or Petitioners herein allege they were done for, but at the same time that question or that matter of determination by me has been completely taken away by the laws enacted by the Congress and by the decision of the United States Supreme Court in Allen versus State Board of Elections. I am not to determine that. All I can determine under the law is whether or not there has been such a change in standard, practice or procedure of voting qualifications or prerequisite than those that existed on November 1st, 1964, and after that—with out approval, which has been stipulated that that has not been requested and without that we can't go any further in this case.

By Mr. Goza: I see, Sir. The second purpose of Mr. Noble's testimony was to show that in the area that—what I call the eastern annexed area, the 1966 area, that a large number of the people who live there now were residents of and qualified electors of the City of Canton on November 1, 1964, who have subsequently moved into this area.

By the Court: I would let you go into that.

By Mr. Goza: And then the second is the reason the polling places were [89] changed, for the Court's benefit in this, that two of the polling places that were used prior to November 1, 1964 are not available to the City. They just can't be used.

By the Court: I would let you go into that.

By Mr. Goza: (continuing direct examination of Mr. Noble)

Q. Mr. Noble, are you familiar with the area which the City annexed in 1966? A. Yes, sir, I am.

Q. And in what area is that? A. The east part of the City, sir.

Q. Do you know how many houses were in this annexed area when it was annexed? A. I would estimate about twenty.

Q. Do you know how many houses there are now? A. Approximately sixty.

Q. Do you know whether or not—by the way, are you connected in any way with the development of that area? A. Yes, sir, we have a construction company which builds new homes and we have built quite a few in this area, sir.

Q. Are you familiar with the persons who have bought these homes and who have moved into them? A. To a great degree, yes, sir.

Q. Con you estimate the number of people in the eastern area who were qualified electors of the City of Canton on November [90] 1st, 1964 and have since moved into the annexed area? A. It would be just a rough estimate, Mr. Goza, but I would estimate maybe twenty-five or thirty.

Q. Twenty-five or thirty people? A. Yes, sir, about fifteen families.

Q. Do you know what the population of that area is now? A. I would estimate perhaps ninety or a hundred persons in this area. I am not positive about that, sir.

Q. Do you know what the population of the area was in 1966 when it was annexed, your best estimate?

By the Court: Are you talking about voters or population?

By Mr. Goza: Population, your Honor.

By the Witness: This is the question, Mr. Goza because we are getting into children and I am trying to estimate the adults in this area.

By Mr. Goza: (continuing direct examination)

Q. Base it on the adult population. A. I would hate to venture a guess, Mr. Goza, because it would be just a rough estimate on my part, I would say perhaps fifty-five or sixty.

Q. Who lived in the area at that time? A. In 1966? [91] Q. Yes. A. No, sir, maybe without going house by house down the different streets it would be very difficult to do, which I am trying to do mentally but I am having a problem of keeping up with the streets and houses.

Q. I see. Are you familiar with the area which the City annexed in 1968? A. Yes, sir.

Q. Do you know the number of houses in that area? A. Approximately a hundred houses, sir.

Q. Can you give us an estimate of the adult population of that area? A. Perhaps a hundred and eighty, sir.

Q. Mr. Noble, do you hold any position with the City of Canton at this time or any of its agents? A. I am a member of the Democratic Election Commission, sir.

Q. State whether or not you played any part in the selection of the polling places which we propose to use in the primary and general elections? A. Yes, sir, I did.

Q. I call your attention to the First National Bank building. Until this year, has that been used as a polling place in the City of Canton? A. It has in the past, yes, sir.

[92] Q. Why was it not so designated for this election? A. The Board of Directors and the President of the Bank asked that it not be used in the future for security regulations. The polls open at seven and the bank's legal hours are from nine until two and the polls remain open until six. The use of voting machines now, they are approximately six feet long and they take up quite a bit of room. I think the plan is for five machines for that ward and there is just not enough room in the small lobby of the bank, sir, and this is true also of the Canton Exchange Bank. They have asked that their facilities not be considered for use any longer.

By the Court: We are going into this question of motive again.

By Mr. Goza: Yes, sir, your Honor, I don't know how to get around this.

By the Court: I am powerless to decide this case on the question of motive. That is a matter that the Congress and the United States Supreme Court has said is left up to the Attorney General of the United States and the District Court for the District of Columbia. It completely deprives the United States District Courts of the districts

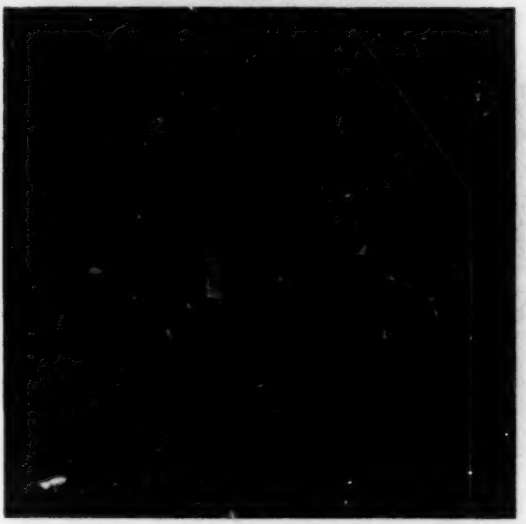
in which these matter come up and arise from making a determination in this matter.

By Mr. Goza: Your Honor, the purpose of this was not so much the [93] motive but the fact that if an election is going to be held at all in Wards Two and Three, it will have to be held somewhere else from the old places. There is just no way—that's the dilemma that we are in, that those people have no place to vote any more and I certainly don't think it is the intention of the Congress or the Court to require the owner of private property to let it be used as a polling place.

By the Court: The changing of polling places doesn't impress me at all as changing any standard or real procedure or practice that is meaningful. The thing that concerns me is the annexation of these two new areas and increasing the number of voters who could vote in the City of Canton, that is, it took in new areas just as the State Legislature did when it authorized county wide elections for supervisors of each beat, and that's exactly what was struck down and prohibited in Allen versus State Board of Elections.

* * * * * * * * * *

Exhibit P-1



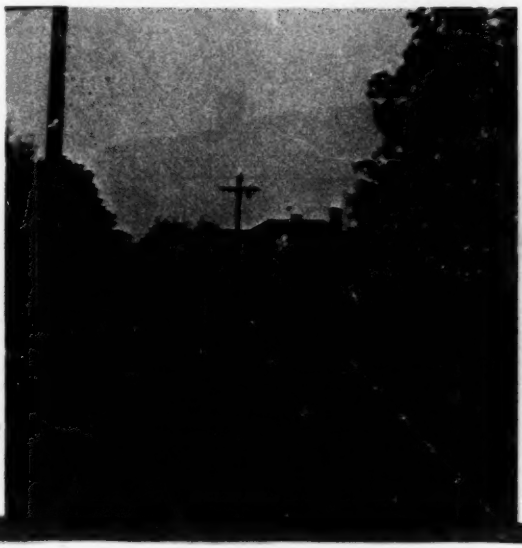


Exhibit P-1 (Continued)

Exhibit P-1 (Continued)

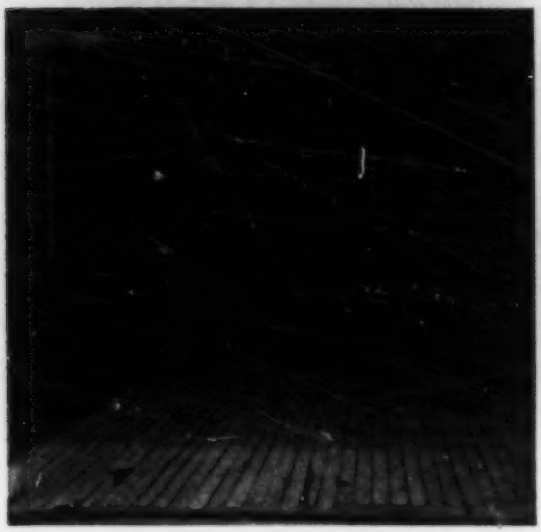


Exhibit P-2

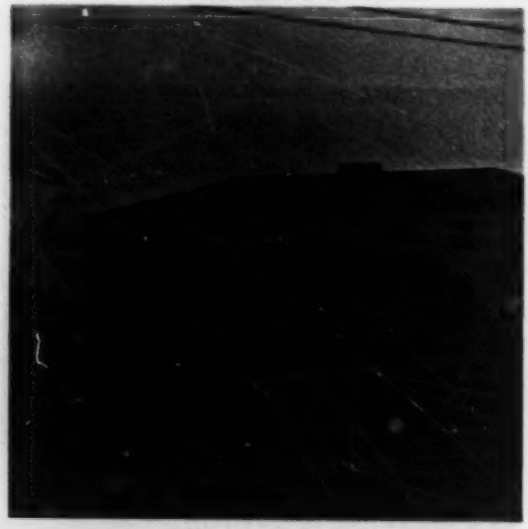


Exhibit P-2 (Continued)

Exhibit P-3

Exhibit P-7

Excerpts from Transcript of Proceedings of June 2, 1969

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action Number 4464

ERNEST PERKINS, JOHN NICHOLS, ROBERT CHINN, CHARLES HARRIS, JR., FLONZIE GOODLOE, and VERA COLLINS, on their behalf and on behalf of all others similarly situated, *Plaintiffs*

v.

L. S. MATTHEWS, MAYOR OF THE CITY OF CANTON, GLYNN COOK, AMOS DOWDLE, JR., EARL B. GOOLSBY, SR., L. H. JOHNSON and HERMIT JONES, Aldermen of the City of Canton; C. F. RIDDELL, R. H. HOLMES, DR. G. A. CARMICHAEL, GUS NOBLE, MACK RAGSDALE and ROB DOW, Democratic Municipal executive committee of the City of Canton; and R. H. SHACKLEFORD, JR., JOE IUPE, and WILLIAM B. CRAWFORD, Municipal Election Commission of the City of Canton, *Defendants*

APPEARANCES:

ARMAND DERFNER and TAUNYA LOVELL BANKS, 603 North Farish Street, Jackson, Mississippi;
For the Plaintiffs.

ROBERT L. GOZA, and BOB MONTGOMERY, 114 West Center Street, Canton, Mississippi;
For the Defendants.

[2] BE IT REMEMBERED that on, to-wit: Monday, June 2, 1969, the above styled and numbered cause came on for hearing before the HONORABLE J. P. COLEMAN, United States Circuit Judge, HONORABLE WILLIAM HAROLD COX, United States District Judge, and HONORABLE WALTER L. NIXON, JR., United States District Judge, at Jackson, Mississippi, in the Jackson Division, when the following proceedings were had and entered of record:

• • • • • • • • • •

[8] By Judge Cox: [9] Let's move along, gentlemen. As I recall it this morning it was agreed by counsel that the 1965 extension embraced 23 houses with 46 voters, all negro.

By Mr. Doerfner: That's right, Your Honor.

By Judge Cox: You couldn't make an agreement as to what was embraced in 1966 extension so that will be a subject matter of proof. 1968 extension it was agreed that it embraced 60 houses, 56 of which were white and 4 of which were colored involving 120 voters. Is that correct, counsel?

By Mr. Goza: That is correct, Your Honor.

By Mr. Doerfner: Yes, sir. The numbers of voters are approximate and based on just a rough formula counting an average of 2 voters per house.

• • • • • • • • • • •

[11] First witness is Mr. John Nichols

John Andrew Nichols

called as a witness for and on behalf of Plaintiffs, was sworn and testified as follows:

Direct Examination

[12] By Mr. Doerfner:

Q. State your name sir? A. John Andrew Nichols.

• • • • • • • • • • •

Q. And where do you reside? A. In Canton, Mississippi.

Q. What is your occupation? A. I'm a lawyer.

Q. How old are you? A. 26.

Q. And how long have you lived in Canton, Mississippi? A. All my life.

Q. Are you a plaintiff in this case? A. Yes, I am.

Q. In what status? A. I'm sorry.

Q. In what status are you a plaintiff? A. I'm a plaintiff as one of the candidate. I'm a candidate for mayor in the City of Canton in the upcoming elections.

Q. And are you familiar with population of the City of

[13] Canton both in terms of its general location and its racial breakdown? A. Yes, I think so.

Q. And in what way are you familiar with that or how have you become familiar with that? A. I am familiar by the fact that I have resided in the town all my life and uhh as far as breakdown goes I'm uhh I have done voter registration campaign in the City of Canton and I'm also familiar on that basis with the uhh residential areas and the uhh number of registered voters and the approximate population of the town.

Q. In terms of that registration campaign have you seen the list of registered voters in the City of Canton? A. Yes, I have.

Q. And when have you seen those? A. I saw, have seen them on numerous occasions. Uhh one I saw them on about January 12th, uhh 12th or 13th, in the City Clerk's office at City Hall in Canton and I saw them later on couple of later occasions just too uhh for my own purposes.

Q. Have you worked with those lists? A. Yes, I have.

Q. For what purpose? A. Well, uhh to approximate the voting uhh registration [14] and strength in Canton we went over the lists and copied them by hand uhh beginning on January 12th or 13th and uhh since that time we also had uhh our campaign and we have been back over the lists then to approximate the number of voters who are registered during our campaign and to give a new picture of the strength of the voters in Canton.

By Judge Nixon: You an independent or a democrat in the coming election?

By the Witness: I'm an independent.

* * * * * * * * * *

By Mr. Doerfner:

Q. I'm showing you three pages, Mr. Nichols, and ask if you can identify those pages? A. Yes, I can.

Q. What are they? A. These are copies of uhh calcu-

lator tapes which I used [15] to figure out the number of voters in each ward for the City of Canton.

Q. And do the totals on those pages reflect your estimate of the number of whites and number of blacks registered in each ward as at a certain date? A. The totals do that and uhh they represent the uhh the list as it was hand copied after uhh on about January the 12th, 1969.

Q. And you have on there as I gather both individual ward breakdowns and total breakdown? A. Right.

Q. What is the total breakdown by black and white? A. Total is 2052 black, this is as of January 12th or 13th, 1969, and 2,794 black.

Q. 2052 white and 2794 black? A. Right.

Q. And as— A. (Interrupting) As of January 12th.

Q. And this is based on your estimate based on your analysis of the names and addresses of the people on the list? A. Right. I went through the list personally. I went through each name to uhh check by residence and name or by address and name uhh whether a person was approximate black or white and uhh I came up with [16] totals as result.

Q. You are not saying those are precise totals to the exact number are you? A. No, I'm not.

Q. You could be off by a little bit? A. Right, but I think its 95% or more correct.

Q. Has there been, was there subsequent registration after that date of voters who would have been eligible for this election? A. Right. Well as I stated we did a voter registration campaign leading up to uhh February 3rd which would have been the cutoff date for people who could have registered and voted in the June elections, in the May and June elections and uhh during that campaign we registered uhh approximately 150 more black people and they were approximately uhh I think 800 or 810 uhh white voters registered in the same period.

Q. And would that also include people who had registered with the federal registrar after February 3rd? A. No, those figures I just gave you do not.

Q. And were there some few additional voters registered with the federal registrars? A. Right. Uhh I don't have any figures off hand but there were approximately, I really can't approximate but I just uhh would guess but there were a number of them [17] registered after.

Q. Would it be fewer than 100? A. I would say it would be approximately 100 maybe.

Q. And you don't have the racial breakdown of those figures? A. No, I don't.

By Mr. Doerfner:

I would like to have those three sheets marked for identification and introduced into evidence as exhibit to plaintiff Nichols' testimony.

By Judge Coleman:

Let them be so marked and admitted.

(Received in evidence and marked Plaintiff's Exhibit .)

By Mr. Doerfner:

I would like to have the map shown to the witness please.

Q. Now, Mr. Nichols, I direct your attention on that map, I'm sorry. Could I have the, could I have the witness shown the exhibit for another moment? Could you show the witness the exhibit again, the original exhibit, those three pages. Mr. Nichols, do those, does that exhibit indicate which are black majority wards and which are white majority wards and by about how much? A. Yes, they do.

Q. What does it show as to that? [18] A. Uhh predominantly black wards are wards three and four.

* * * * * * * * * *

By the Witness:

Right. The predominantly negro wards are wards three and ward four and in ward three there's approximately uhh an 1100, yes, an 1100 uhh black majority and in ward four there is approximately uhh 700 vote black majority.

By Mr. Doerfner:

Q. Thank you. Now can I have him shown the map?

By Judge Cox:

You have already counted votes have you?

By the Witness:

I'm sorry sir.

[19] By Judge Cox:

You tell us about what the majorities are. You have already counted the votes have you, you say there will be 700?

By the Witness:

Uhh I counted the names on the lists that I had, I didn't count votes, no sir.

By Judge Cox:

You assume they are going to vote by race. I thought that had been condemned by everybody.

By the Witness:

No, I just uhh uhh I used the term voters loosely, Your Honor. The word black registered voters as I stated would be more correct.

* * * * * * * * * *

[24] By Judge Coleman:

Have your witness to mark these locations on the map without any further elaboration to us. If you want to make it a part of the record just let him mark the places because I am as familiar with Canton as you are in all likelihood and probably more so. I know where these places all are and we are taking up a lot of time unnecessarily if you are trying to proce the case before us. Let him take his pencil, mark these locations, write out by them what they are, and let's to on with our proof, because we are wasting a lot of time.

[25] By Mr. Doerfner:

Q. Mr. Nichols,—

By Judge Cox:

Let him do that when he steps off the stand.

By Judge Coleman:

Yes, he can do that when he comes off the witness stand.

By Mr. Doerfner:

Okay.

Q. Mr. Nichols. refering to ward four in the city would you indicate what the racial composition of the neighborhoods is with especial reference to the location of polling places? A. Where the polling place was uhh designated by the city ordinance to be for these elections 1969 it is where I have number two which is about here and its located in a predominantly white area and its near also a white church borders right near the polling place. Now uhh in ward, and basically what you can do is that bring this line, this boundary line in to about here—

Q. (Interrupting) Which boundary line is that? A. This is the boundary line for ward four where—

Q. (Interrupting) Along what street? A. This is on Yandell Street and if you just extend it out to uhh approximately uhh the railroad crossing—

Q. (Interrupting) West? [26] A. Yes, west, to about the railroad crossing and go uhh about due north the whole area would be totally almost totally white and all the rest of the area from the railroad crossing further west to the boundary of the city and on south would be practically all black.

Q. And is that new polling place also near the newly annexed area? A. Yes, it is. Its uhh, its right I think within a half mile to a mile of the polling uhh new annexation zone.

Q. Have you seen elections being conducted in Canton in the past few years? A. Yes, I have.

Q. And how many have you seen? A. Oh, I've seen—

. . . . . .

By the Witness:

In 1967 I saw the uhh democratic party primaries and run off. Uhh elections in 1968 I saw the presidential [27] election.

Q. And have you seen the elections in ward four in these areas at these times? A. On those three occasions?

Q. Yes. A. Yes, I did.

Q. And the elections in that area for the county and state elections? A. Well all uhh most of the people in what is ward four would be in what is called uhh in the county the west ward and they all voted up here at the armory which is on Park Street in Canton, the National Guard Armory. Q. And have you observed by what means most of the black voters in ward four have reached the polling place? A. Majority of them walk.

Q. Thank you. I direction your attention further, Mr. Nichols, to the, I'm sorry, strike that?

By Judge Nixon:

How far is the old from the new polling place in ward four?

. . . . . .

[28] By the Witness:

I'd say about maybe half a mile to a mile, Your Honor, or maybe, that, thats about that.

. . . . . .

[29] Cross Examination

[30] By Mr. Goza:

Q. Your testimony on direct examination was that you made a compilation of the total number of voters in the

City of Canton as of January the 12th, 1969? A. Yes, as of about that date.

Q. What was the total figure? A. Could I see those lists that I just made. Total figure as of that date was 2,794 black, 2,052 white.

Q. Make a total of 4846, do you agree with that figure? A. Yes. Yes sir.

Q. What was the total number of voters regardless of race residing within ward four as of that date? A. In ward four?

Q. Regardless of race the total number of voters? A. I come up with the figure of 1585.

Q. What is the total number of voters residing in ward four regardless of race as of this date according to your figures? A. As of this date? I don't have figures as of this date. I took these only as of that date and I made an approximation at to what had occurred since then.

By Judge Coleman:

When were these extension ordinances adopted or when was the last one adopted, let me put it that way?

By Mr. Goza:

[31] Your Honor, it was adopted, I don't know the exact date it was adopted. It became effective on August the 15th, 1968.

By Judge Coleman:

That would really be the test on—

By Mr. Goza:

(Interrupting) The effective date, yessir.

By Judge Coleman:

(Continuing) the voting strength is now. I just mention that to you, let us move on if you will, its now how many people you have at present, its what the condition was at the very time the extension was made so far as voting

rights act is concerned we are now passing on the validity of the extension, not conditions as of the present time.

• • • • • • • • • • •

By Mr. Goza:

Q. Do you know how many registered voters regardless of [32] race there are in ward four at this time? A. No, I do not.

Q. Do you know how many registered voters regardless of race there are in wards three, two or one at this time? A. At this time?

Q. Or at any time subsequent to January the 12th, 69? A. No, I didn't do breakdown by, I just have totals for, approximate totals.

Q. Do you know what the total voter registration regardless of race is in the City of Canton as of this time? A. As of this time I think the figures that I gave beforehand and approximating is 150 additional black voters and approximately 810 white voters I come up with figures of black voters 2,944 and white voters 2,862 uhh which is difference of about 82 votes.

Q. Upon what records, if any, did you base your figure of 150 additional black votes? A. Well, uhh I did in uhh some additional people out to the City Clerk's office and we checked the cards which he had which were not at that time in the poll books or the books for each ward and when we took down the names of all persons and the addresses and we then broke it down on that basis as to uhh number of black and number of white.

Q. And this was the closest approximation you could make? [33] A. As of uhh now these figures were as of about uhh February 4th or 5th. Now there have been additional registered since uhh since that date by a federal registrar black and white.

Q. That's the point I am making. Would you state to the Court what the racial breakdown is of the people registered to vote prior uhh subsequent to February the 3rd, 1969? A. By racial?

Q. By the federal registrar? A. No, I don't have any knowledge as such.

Q. You did not count those? A. No.

• • • • • • • • • • •

Q. Would it be a fair statement to say that black people have registered with the federal registrar since February the 3rd of this year? A. Right. Same would also be true as to white persons.

Q. Would you give me your best judgment as to white people who have registered with the federal registrar and [34] their names, if you know? A. Best judgment as to persons and how many, is that?

Q. How many, that's what I am interested in? A. No, I, I don't really know their names or how many but I do know that a number of them did register because I observed them personally.

Q. So your figure of 150 black votes as of February, additional black voters as of February the 3rd is not correct? A. Yes, it is correct.

Q. Is it correct as of now? A. I'm sorry, I don't understand the question.

Q. You said that as of February the 3rd, 1969, that approximately 150 black people had registered to vote between then and February the 3rd— A. (Interrupting) Between January the 12th—

Q. (Interrupting) And February the 3rd? A. That's right.

Q. All right. Now, how many black people have registered to vote since February the 3rd, 1969? A. Oh, I, I don't have any idea.

Q. But you do admit that there have been some? A. Right as have been some whites.

Q. Have there been more black or more white registered with the federal registrar since February the 3rd, 1969? [35] A. I would say more whites registered with the registrar.

• • • • • • • • • • •

[38] By Mr. Doerfner:

Your Honor, the parties will stipulate that there are now some 78 white houses out there and some 14 black houses in that expansion.

By Judge Cox:

Out where?

By Mr. Doerfner:

In the east expansion, 1966.

• • • • • • • • • • •

[39] By Mr. Doerfner:

Two to a house, there would be 156 white votes and 28 black votes.

• • • • • • • • • • •

By Mr. Goza:

Your Honor, the further stipulation was, counsel, was that at the time of the expansion, the effective date of the expansion was June the 4th, 1966, which we contend is the date of importance there were 32 white [40] houses and 14 colored houses—

By Mr. Doerfner:

(Interrupting) We stipulate to that.

By Mr. Goza:

(Continuing) and that the number of houses at this time is irrelevant but we are willing to stipulate in the interest of time.

By Mr. Doerfner:

We will stipulate as to the 32 figure too.

• • • • • • • • • • •

By Mr. Doerfner:

The further stipulation is that at the time of the expansion there were 32 white houses with 64 votes and 14 black houses with 28 votes.

. . . . . .

By Mr. Doerfner:

[41] That's right. There have been no new black houses and then according to stipulation 60 new white houses.

By Judge Cox:

All right.

By Mr. Doerfner:

Plaintiffs have no further witnesses and we rest, Your Honor.

By Judge Coleman:

All right. Who will the defense have first?

By Mr. Goza:

Your Honor, at this time, pursuant to the agreement, and subject to the plaintiff's objection as to materiality, it is stipulated that if L. S. Matthews, Mayor of the City of Canton, were called as a witness in this cause he would testify that the expansions were done pursuant to the planned adopted 1962 and referred to in the stipulation, that none of the annexations, that in none of the annexations was any area included or any area excluded for reasons related to race or for the purpose of changing or altering the racial composition of the electorate of the City; that such expansions were done in good faith and for lawful and proper governmental purposes. Of course that's subject to their objection for relevancy.

By Mr. Doerfner:

[42] May it please the Court, we do not stipulate to the truth of those facts. We stipulate only to the fact that

the Mayor would say that if he were called and allowed to testify.

By Judge Cox:

That's what he said.

By Mr. Doerfner:

That's right, and we most assuredly do object to the admissibility of that testimony on the grounds that it is not relevant to this case.

By Judge Coleman:

The objection will be overruled and we will consider that along with all of the other proof.

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[45] **Gus Noble**

called as a witness for and on behalf of defendants, was sworn and testified as follows:

* * * * * * * * * *

[46] Direct Examination

By Mr. Goza:

Q. State your name for the record please? A. Gus Noble.

Q. Where do you live, Mr. Noble? A. 701 Cathy Circle, Canton, Mississippi.

Q. How long have you lived in the City of Canton? A. Approximately 49 years sir.

Q. What official position, if any, do you hold with the democratic party in the City of Canton? A. I'm on the election commission sir.

Q. Did you play any part in the searching for and selection of polling places to be used in the democratic primaries for the municipal elections this year? A. Yes, I did.

Q. And what part did you play? A. The examination of all of the places which we felt like were available and adequate to conduct this election.

Q. Would you state to the Court the reason for changing the polling place in ward one from the unemployment office to the Sacred Heart Parish Center?

[47] By Mr. Doerfner:

Your Honor, I object to this on the grounds its not relevant.

By Judge Coleman:

Overruled.

By Mr. Doerfner:

May I have a continuing objection to this line of testimony without bothering each time?

By Judge Coleman:

You may.

By Mr. Goza:

Q. Mr. Noble, state your reasons very briefly if you will please? A. The unemployment office is a small frame building with the only parking available to the rear of it, the inside facilities or construction of the building in our opinion was not adequate to conduct this election due to the fact we were using voting machines which require approximately six feet in length for each machine. The Catholic Parish, Sacred Heart Parish recreational building was available which was immediately in front of the city hall approximately a block and a half to the east of the old building, adequate parking was available, inside facilities were such that the election could be conducted in a very expedient manner, [48] bathroom facilities were available for the workers, it was close to the city hall as I said right across the street from it which would give access to any questions arising from the election so for these reasons we selected this site sir.

Q. Why did you recommend that the polling place in ward two be changed from the First National Bank to the

City Hall? A. The facilities of First National Bank were not available because of the space required again for the election, the lack of parking facilities. The City Hall has all these facilities and we made the selection for this reason sir.

By Judge Coleman:

Well now the First National Bank big as its ever been wasn't it?

By the Witness:

Yes sir, it is.

By Judge Coleman:

Did they continue to give you, did they deny you permission to use the building?

By the Witness:

Yes sir, they did. One of the reasons was security sir.

By Judge Coleman:

[49] That settles that. You can't use private facilities for public purposes unless you have permission. What is your next one.

By Mr. Goza:

Q. Why did you recommend that the polling place for ward three be changed from the Canton Exchange Bank to the old jail building? A. For the same reasons sir the facilities were denied us.

Have any steps been taken to renovate the jail building for use as a polling place? A. Yes sir, it was prepared for the polling place, being cleaned up and repaired, the necessary electrical work done to accomodate the voting machines was done prior to the anticipated election in early May.

Q. And lastly, why was the recommendation made to change the polling place in ward four from the Court House to the Canton School Administration Building on Yandell Avenue? A. First was the conflict with the Cir-

cuit Court now in session in June and the County Court during May, lack of parking facilities, inadequate space in the court house for the voting machines. We selected the school administration building because it does have parking facilities, the interior arrangement of the building would allow for the use of the voting machines, bath [50] room facilities were available to the workers. This is the reason we selected this site sir.

Q. Mr. Noble, are you familiar with the area annexed to the City of Canton in the year 1965? A. Yes sir, I am.

Q. That area is generally south of the 1960 boundaries is it not? A. Yes, it is.

Q. Did you make an actual count of the houses in that area? A. Of the living units, yes sir.

Q. How many did you? A. 23 sir.

Q. Are you familiar with the area annexed to the City of Canton to the east in the year 1966? A. Yes sir, I am.

Q. Do you know how many residences were in that area on June the 4th, 1966? A. Yes sir, total of 46.

Q. Do you know how many of those houses were occupied by white people and how many were occupied by black people? A. 32 by white families and 14 by colored families.

Q. Did you make a survey of the area annexed to the City of Canton in the year 1968 to the north? A. Yes sir, I did.

[51] Q. And did you determine the number of dwelling units in that area? A. 56 occupied by white families and 4 by colored families.

By Mr. Goza:

I believe that's all we have, Your Honor.

By Judge Coleman:

Anybody make any objection or raise any objection about holding an election in a church or in a church owned facility in violation of separation of church and state?

By the Witness:

No sir, the only objection was raised by the complainants here.

By Judge Coleman:

I suggest to you that elections ought not to be held in churches or church owned facilities regardless of the denomination.

By the Witness:

Yes sir.

By Judge Coleman:

Under the decisions of the courts down through the ages about keeping the churches and the state functions separate.

By the Witness:

I agree with that sir.

By Judge Coleman:

[52] All right sir. You may stand aside, Mr. Noble. Do you have any cross examination?

By Mr. Doerfner:

I have just brief cross examination.

Cross Examination

By Mr. Doerfner:

Q. Mr. Noble, was there a city election in 1968 on a bond issue? A. Yes sir, there was.

Q. And do you know where the polling place for ward three was at that time? A. No sir, I do not. I believe, I may stand corrected on this sir, that it was in the old building.

Q. To refresh your recollection I believe the parties have, the defendants answer admits that part of the complaint which indicates that the 68 ward three elections was in the

Shackelford building? A. Yes sir, that's the old building there.

Q. I see. Is that building now in use? A. No sir, it is vacant.

By Mr. Doerfner:

No further questions.

By Judge Nixon:

Do you know whether anyone was interferred with or prevented from voting at any of the new voting places?

[53] By the Witness:

No sir, they were not interfered with. The place that he is making reference to now was also denied us sir.

By Judge Nixon:

Anyone ever complain they were afraid to go to the new polling places because they weren't where they used to be but they were in a white neighborhood as distinguished from a negro neighborhood or vice versa?

By the Witness:

No sir, Your Honor.

By Judge Nixon:

All right.

By Mr. Doerfner:

Q. Have any of the polling places projected for use in 1969 ever been used before? A. The City Hall has been used sir.

Q. That's number two? A. The rest of them are new.

Q. Including three and four? A. Yes sir, all of them are new sir with the exception of the City Hall.

* * * * * * * * * *

[54] **Van Smith, Jr.**

called as a witness for and on behalf of Defendants, was sworn and testified as follows:

* * * * * * * * * *

Q. What is your name please sir? A. Van Smith, Jr.

Q. Where do you live, Mr. Smith? A. 115 West Sims Street, Canton, Mississippi.

Q. How long have you lived in the City of Canton? A. Approximately 46 years.

Q. Mr. Smith, have you been asked to make a canvass or a survey based on the number of residences in the areas annexed by the City of Canton in 1965, 66 and 68? A. I have.

Q. Have you made such a canvass of the potential voters in each of these areas? A. Yes, sir.

Q. Calling your attention to the south or 1965 expansion, what was your result of your canvass or survey in the regard to the number of potential voters in that area? [55] A. The number of potential voters in that area was 46.

Q. How did you arrive at that figure please sir, very briefly? A. By making a survey of the number of houses in the area and using the factor of two voters per house which would give a total of 46.

Q. Did you make—

By Judge Cox:

You know looks to me like you are going right along with your stipulation. You have already stipulated about what number of houses are in 65, 66 and 68.

By Mr. Goza:

Your Honor, this one will only take just a second and the final question I think will clarify it.

By Judge Cox:

All right.

By Mr. Goza:

Q. Did you make such a survey in the east or 1966 annexed area? A. Yes sir.

Q. Did you make such a survey based upon the existing residences as of June the 4th, 1966? A. I did sir.

Q. And what was the result of the number of potential voters regardless of race in that area? [56] A. The number of potential voters was 96 on January, uhh June the 4th, 1966.

Q. Of that many how many were colored? A. 28.

Q. Did you find any white voters in the south or 1965 annexed area? A. No sir, I did not.

Q. So the figure of 46 is all colored, is that correct? A. That is correct.

Q. How many potential white voters were in the east or 1966 annexed area? A. 64.

Q. Did you make such a survey in the north or 1968 expanded area? A. I did sir.

Q. And what was the total result of your survey in regard to potential voters regardless or race? A. 120 sir.

Q. Of that number how many were colored and how many were white? A. 8 were colored and 112 were white.

Q. Mr. Smith, are you, have you made a survey of the voting records in the City Hall of the City of Canton? A. Yes sir.

Q. Do you know the total number of registered voters in [57] the City of Canton as of August the 15th, 1968? A. May I refer to my notes sir.

Q. If they were made by you sir and as a result of your study. As of August the 15th, 1968 there were 2094 white registereds, 2602 black registereds.

Q. Have you made or computed any figures to show what the potential effect on the racial composition of the electorate of the City would be if all of the potential voters in the north or 1968 annexed area had registered to vote? A. Question again please sir.

Q. If all of the potential voters in the north or annexed area had registered to vote after August 15th, 1968, what would be the total number of voters in the City of Canton based upon the figures you just gave me? A. In the City of Canton the total would be approximately 6,000 sir.

By Judge Coleman:

What would the racial composition be?

By the Witness:

The racial, as of now?

By Mr. Goza:

Q. I was speaking as of August 15th, 1968. A. Oh, August 15th, 1968.

Q. I'm taking into consideration the registration of [58] all potential voters in the north annexed area as of August 15th, 1968, what would be the total registration?

By Judge Coleman:

You said the total vote would be 6,000.

By the Witness:

I'm, that was incorrect sir.

By Mr. Doerfner:

Your Honor, I object to this question on the grounds that its irrelevant because the question asked how many voters would there be if some hypothetical had happened, how many voters would there be now if hypothetical had happened. We have evidence in the record already about how many voters there are and I think that's the better evidence and more relevant evidence.

By Judge Coleman:

Well I think we are entitled to consider this too. Objection overruled.

By Judge Cox:

What did you say was wrong, Mr. Smith?

By the Witness:

I was thinking about another date sir. As of August the 15th, 1968 there were 2094 white votes and if we counted all of the potential there 112 plus that would give a total of 2214. The black vote on August the 15th, [59] 1968 was 2602 and if you add the potential there would be 2610. I think that's the figure you want sir.

. . . . . .

[60] Cross Examination

By Mr. Doerfner:

Q. When did you make these surveys, Mr. Smith? A. Over a continuous period of oh two or three months.

Q. Which two or three months? A. What is that?

Q. Which two or three months? A. Just previous to this time.

Q. In other words in the last two or three months from now? A. Right.

By Judge Nixon:

Do you know whether any inhabitants of or registered voters inside the old city limits prior to the 1965 annexation now live in any of the newly annexed area?

By the Witness:

Yes sir, by personal knowledge of some of the people that I know have moved into the area.

By Judge Nixon:

Approximately how many?

By the Witness:

That would be hard to say sir.

By Judge Nixon:

Or the racial composition of them?

By the Witness:

[61] In which area sir?

By Judge Nixon:

All three areas.

By the Witness:

In all three areas. Uhh have registered or potential?

By Judge Nixon:

No, how many registered voters inside the old city limits prior to the 1965 annexation, that is how many residents of the three annexed areas lived inside the city limits of Canton prior to or before the 1965 annexation and were registered voters and later moved to the new area?

By the Witness:

48 sir.

* * * * * * * * * *

By Judge Nixon:

Do you know the racial composition of the 48?

By the Witness:

Those were all white sir.

* * * * * * * * * *

[62] Q. I show you these two paper sets of sheets and ask you when you drew up those figures? A. When they were actually written?

Q. Yes. A. Within the past two days.

Q. When did you make the survey on which those figures are based? A. Over the past three months.

Q. Was some of that done before May the 9th, 1968, uhh 69? A. Yes.

By Mr. Doerfner:

Your Honor, I would like all those, the two sets in his pocket and the set he's just the sheet he is holding in his hand right now marked for identification and admitted into evidence as exhibits.

By Mr. Goza:

Your Honor, just the sheets that he testified from can be admitted in evidence.

By Judge Coleman:

Why of course, any sheet he has testified from can [63] certainly be admitted into evidence. What he has got in his pocket or what I have got in mine that hasn't been referred to of course can't. Just turn over the sheets you have testified from. You are going to have some kind of judicial search of the man's pockets?

By Mr. Doerfner:

No, Your Honor, I am interested just in the material that he has been using.

By Judge Coleman:

That he has testified from.

* * * * * * * * * *

[64] Q. Mr. Smith, since February the 3rd, 1968 have you examined the voter registration records in the City Hall to determine how many people have been registered since that date? A. Yes sir.

Q. How many did you determine? A. There were 92 sir.

Q. Were these people white or colored? A. They were colored sir.

Q. Were there any white people to your knowledge registered in the City of Canton after February the 3rd of 1969? A. No sir.

* * * * * * * * * *

Exhibit P-1

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 4464

Stipulation of Fact

Comes Now, the plaintiffs and defendants, acting by and through their respective attorneys of record, and do hereby stipulate and agree, that the following facts may be introduced into evidence at the trial of this case, but expressly reserve the right to enter an objection thereto for the record, on the grounds of irrelevancy and immateriality:

1. That the City of Canton, Mississippi is a municipal corporation, situated in Madison County, Mississippi and is a political subdivision of the State within the meaning of Section 5 of the Voting Rights Act of 1965.

2. The plaintiffs challenge the validity of the following acts of the City of Canton for failure to comply with Section 5 of said Act:

(a) Three separate annexations of adjacent territory by the City which occurred in 1965, 1966, and 1968, respectively.

(b) The designation of polling places for use in the 1969 municipal primary and general elections different from those used in such elections in May, 1965.

(c) The election of the alderman from each of the four wards by vote of all of qualified electors of the municipality rather than by the vote of the electors of the particular ward involved.

3. None of the above have been submitted to the Attorney General of the United States for approval, and no suit has been filed in the court of appeals for the District of Columbia for a declaratory judgment approving the same.

The defendants do not by this stipulation concede that Section 5 is applicable to the above, and contend that such submission to the Attorney General or declaratory judgment is necessary to the validity thereof.

4. (a) That the population of the City of Canton according to the 1960 Federal Census was 9707.

(b) That the estimated population of the City in May, 1965 was 11,000.

(c) That the estimated population of the City as of June 1, 1969 is 12,500.

(d) That the racial composition of the population was 60% Negro and 40% white and is substantially the same as of June 1, 1969.

5. That in the latter part of 1962 or the early part of 1963, the City of Canton, pursuant to a recommendation of its Planning Board, undertook a comprehensive plan for the future growth and development of the city and the expansion of its corporate boundaries. Basically, this plan provided for the following in the order listed:

(a) The expenditure of approximately $500,000 for the extension of the sewerage collection system and the construction of lagoon type teratment facilities to serve the areas proposed to be annexed.

(b) The extension of the municipal boundaries to the south.

(c) The extension of the municipal boundaries to the east.

(d) The extension of the municipal boundaries to the north.

These extensions were not described by precise boundaries, but rather in general terms in reference to their locations in regard to the 1960 municipal boundaries.

6. That in 1963 the city completed the extension and construction of the sewerage project.

7. That pursuant to said plan the City of Canton subsequently expanded its municipal boundaries:

(a) In 1965, by annexing an area south of the 1960 boundaries along and on either side of U. S. Highway No. 51, there were included in this area a number of commercial establishments and residences. The property owners in this area have paid city taxes for the years 1966, 1967 and 1968 and will pay the same in 1969.

(b) In 1966, by annexing an area east of the 1960 boundaries, along and on either side of Mississippi State Highway #16, the Madison General Hospital, an industry, and several commercial establishments and residences were included. The property owners in this area have paid city taxes for the years 1967 and 1968 and will pay the same in 1969.

(c) In 1968, by annexing an area north of the 1960 boundaries generally along and on either side of U. S. Highway No. 51, several commercial establishments and residences were included. The property owners in this area will pay taxes for the year 1969.

8. That each of such expansions were enacted by separate ordinances adopted by the Mayor and Board of Aldermen of the City of Canton, Mississippi in the years 1965, 1966, and 1968, to become effective upon the approval of the chancery court of Madison County, Mississippi, and after proper publication and notice the same were approved by said *Miss. Code Ann.* (1942 Recompiled) Section 3374-10, et seq., being Chapter 491 of the laws of Mississippi of 1950.

9. That the City of Canton has spent the sum of approximately $750,000.00 for utilities and sewerage exten-

sions and other improvements in the 1966 and 1968 annexed areas and intends to spend an additional sum of approximately $100,000.00 in these and other areas for such improvements.

11. That the map prepared by Covington & Tyner, shows the following:

(a) The 1960 limits within orange lines.

(b) The 1965 annexed area within purple lines.

(c) The 1966 annexed area within red lines.

(d) The 1968 annexed area within green lines.

12. That the City of Canton is now, and was prior to November 1, 1964, divided into four wards. The ward lines as they existed on that date and do now exist are shown in heavy blue on the aforesaid map and are further identified thereon by the numbers 1, 2, 3, and 4.

13. That the polling places designated within the wards for use in the 1969 municipal and primary elections are different from the polling places used in the 1965 municipal and primary elections. That the polling places used in 1965 and those which are designated for use in 1969 are as follows:

Ward No.	1965	1969
I	unemployment office	Sacred Heart Center
II	First National Bank	City Hall
III	Canton Exchange Bank	234 E. Fulton
IV	Madison County Courthouse	School Administration Building

That the polling place selected for use in 1969 as a polling place for Ward III is the building formerly used as the

Madison County Jail but has not been so used in several months and is not now designated as a jail by sign or otherwise.

That the City Hall, designated for use in 1969 as a polling place for Ward II has not previously been used in a municipal general or primary election but was used in a special municipal bond election held on November 5, 1968 and has been used as a polling place for county and state elections.

.....
Counsel for Plaintiffs

R. L. Goza
Counsel for Defendants

Exhibit P-3

Exhibit P-3 (Continued)

Exhibit P(Continued)

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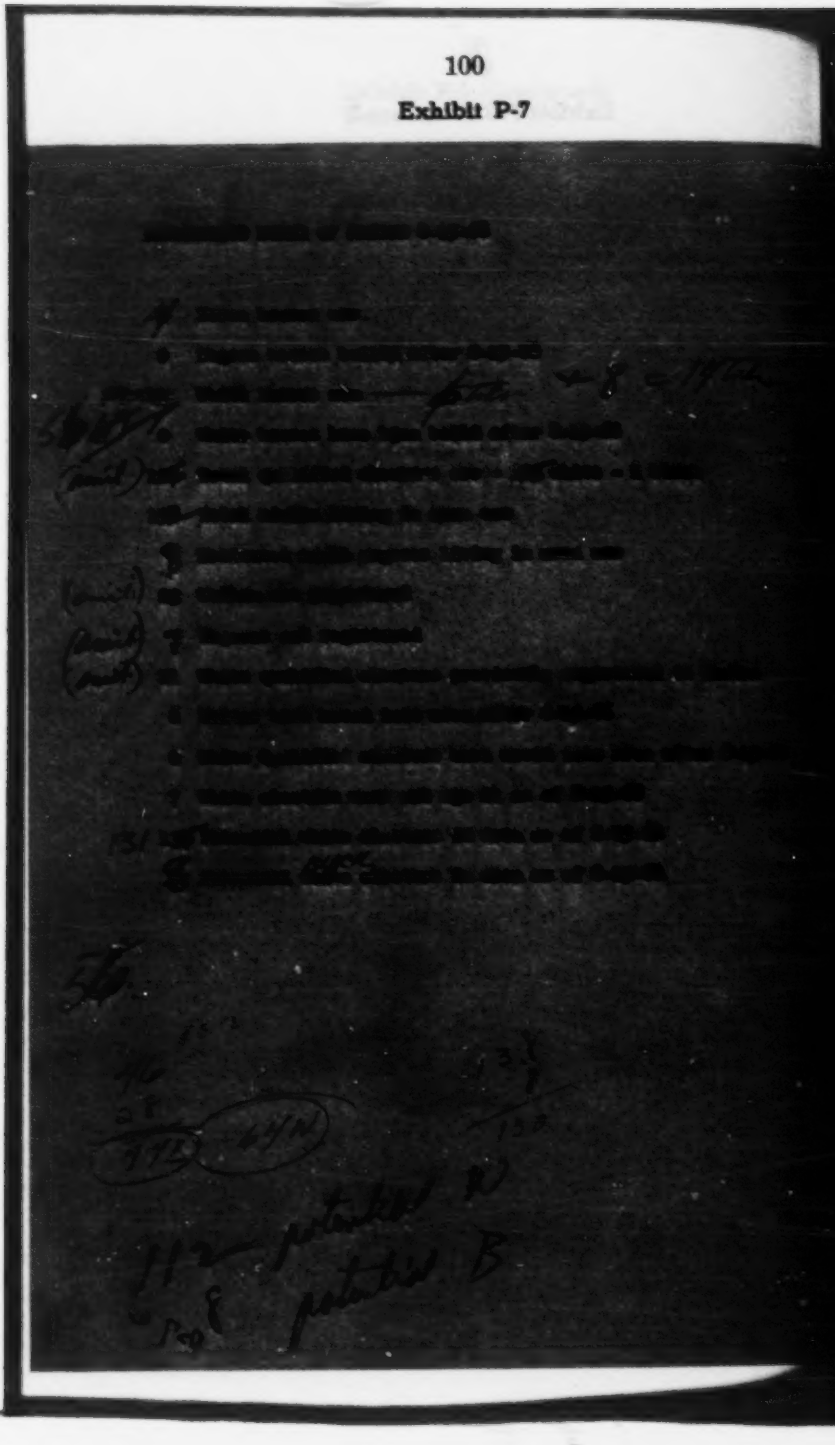
Exhibit P-7



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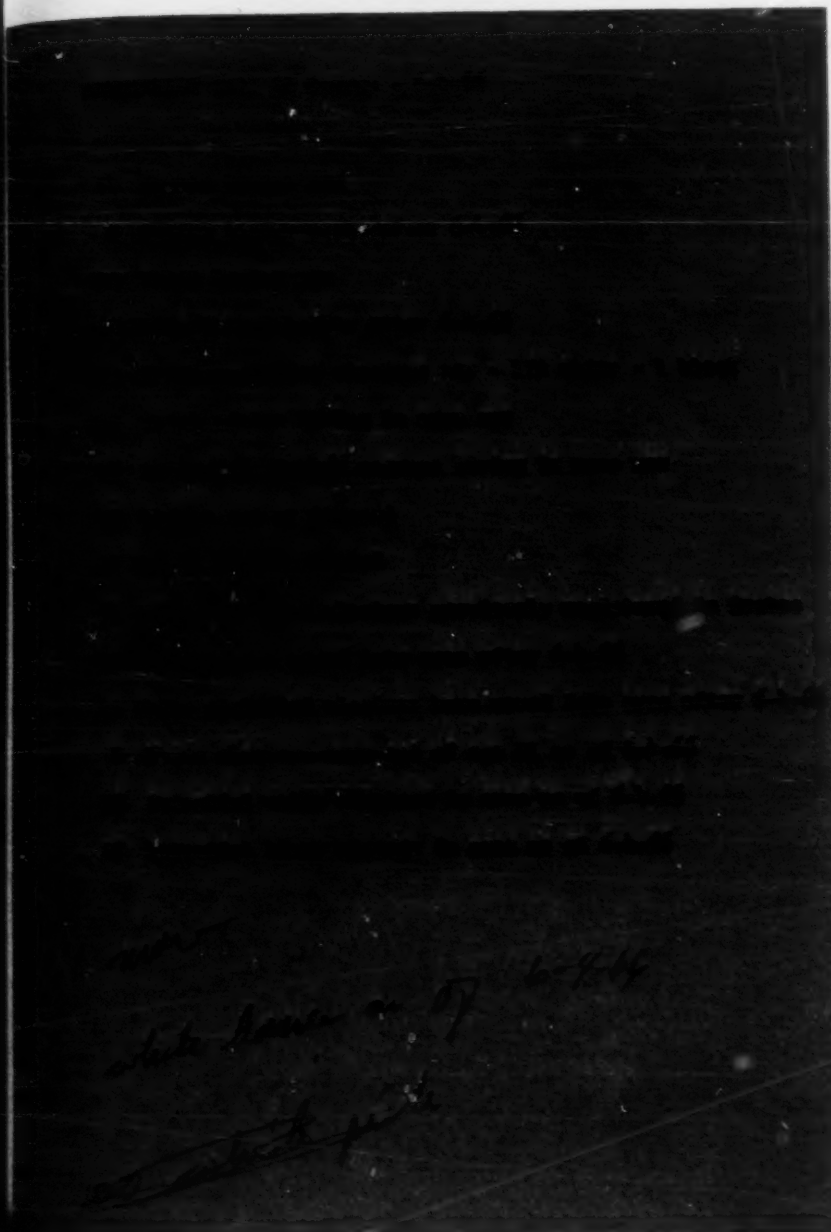

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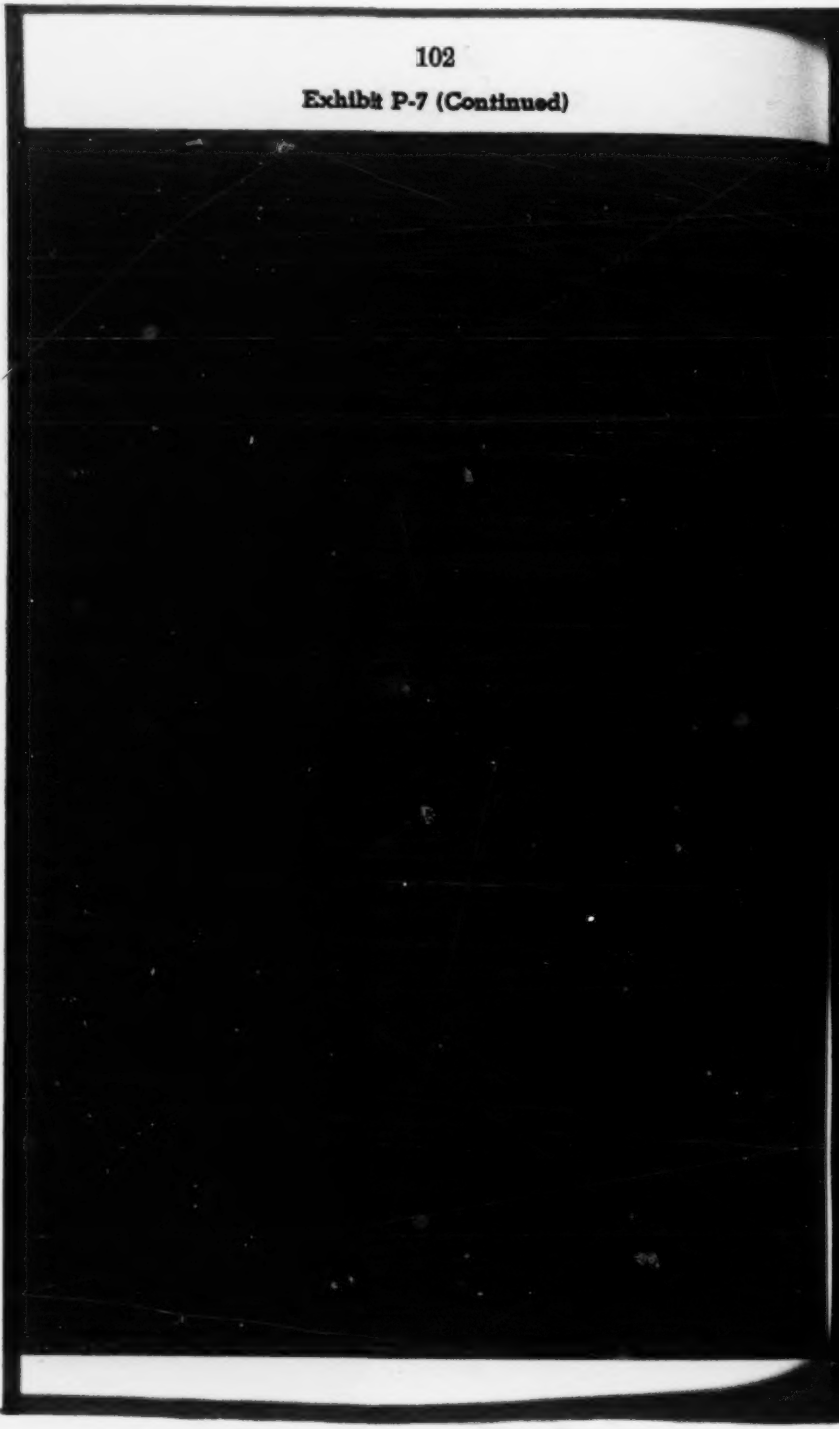
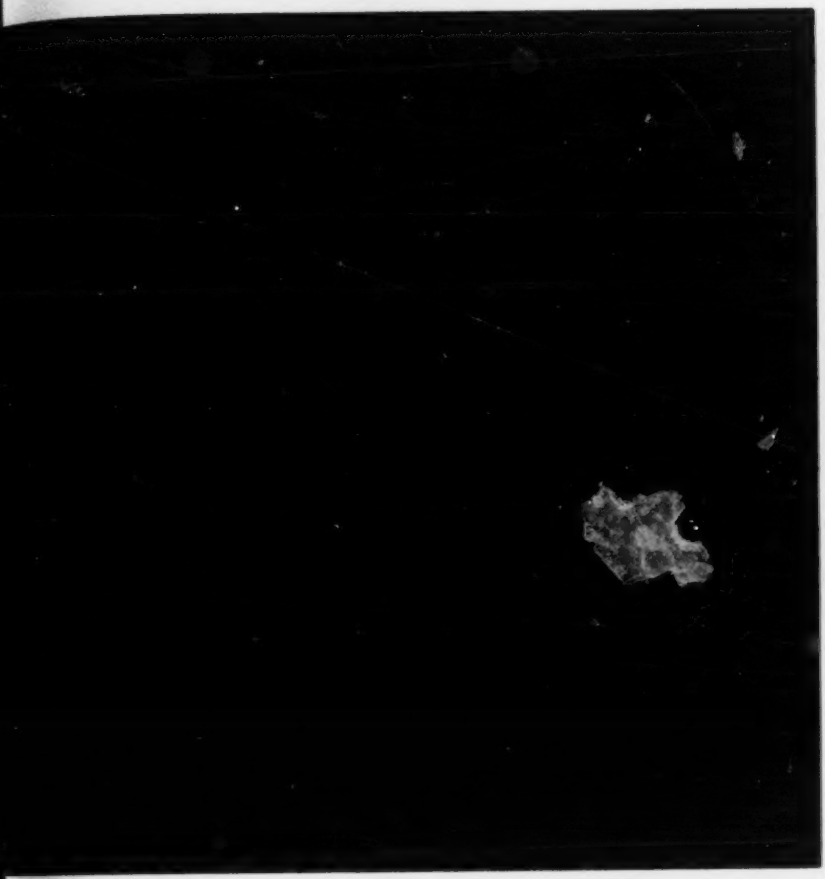


Exhibit D-1



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No. 46

FILED

SEP 29 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

ERNEST PERKINS, ET AL., *Appellants,*

v.

L. S. MATTHEWS, Mayor of the City of Canton, ET AL., *Appellees.*

On Appeal from the United States District Court for the Southern District of Mississippi (Three-Judge Court)

JURISDICTIONAL STATEMENT

ARMAND DERFNER
JAMES A. LEWIS
TAUNYA L. BANKS
603 North Farish Street
Jackson, Mississippi
Attorneys for Appellants

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the three-judge district court, vacating the temporary restraining order and dismissing the complaint, is not yet reported. It is reprinted in Appendix A. The earlier opinion of Judge Nixon, granting the temporary restraining order, is also not reported. It is reprinted in Appendix B.

JURISDICTION

This is a suit to enforce the provisions of section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, against the use by the City of Canton (a subdivision of the State of Mississippi) of a voting practice or procedure different from that in effect on November 1, 1964.

The judgment from which the appeal is taken was entered by the United States District Court for the Southern District of Mississippi on July 24, 1969, and the Notice of Appeal was filed in that court on July 30, 1969.

The jurisdiction of the court below to hear the case was based on 28 U.S.C. §§ 1343(3), 1343(4), and 2201, and 42 U.S.C. § 1973c. *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969). A direct appeal to this Court is authorized by 42 U.S.C. § 1973c, as well as by 28 U.S.C. § 1253, which provides for direct appeals from judgments in cases required by Act of Congress to be heard by three-judge district courts.

STATUTES INVOLVED

The statute involved in this case is section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c:

> "Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [1973b(a)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of

Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court."

QUESTION PRESENTED

Whether a change in a city's municipal election procedure which (a) extends the boundaries to increase the percentage of voters within the city limits, (b) provides for electing aldermen at large rather than by wards, and (c) changes the polling places, is a change dealing with a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," within the meaning of section 5 of the Voting Rights Act of 1965.

STATEMENT OF THE CASE

The City of Canton is the county seat of Madison County, Mississippi, and has a population of slightly over 10,000, of whom about 60 percent are black and 40 percent are white. As a subdivision of the State of Mississippi, the City is subject to the Voting Rights Act of 1965, 42 U.S.C. § 1973. Under section 5 of that Act, if it seeks to adopt "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," it must obtain a declaratory judgment that the new procedure "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." The City may also use the new procedure if it is submitted to the Attorney General of the United States and he fails to object within sixty days.

By the most recent count in the record, as of April 25, 1969, there were 3,042 black voters and 2,953 white voters registered in Canton, divided into four wards which have the following registration totals:

	White	Black	Total
Ward I	839	37	876
Ward II	992	174	1,166
Ward III	418	1,481	1,899
Ward IV	702	1,257	1,959
Unlisted Ward	2	93	95[1]

For most of the 3,000 blacks, the 1969 elections (originally scheduled to begin on May 13, 1969) are the first city elections in which they will vote, since the last

[1] Defendants' Exhibit 1 (June). (Record citations designated "(May)" or "(June)" refer to the May 13 hearing on the Motion for a Temporary Restraining Order and the June 2 hearing before the full three-judge court, respectively.)

elections took place in 1965, just before the passage of the Voting Rights Act, at a time when there were no more than about 200 black voters. Transcript (May) 61.

On November 1, 1964, and at the time of the 1965 elections, the boundaries of the City of Canton were as shown on the map introduced below as Plaintiffs' Exhibit 2 (June); the polling places were as shown in paragraph 13 of the Stipulation, Plaintiffs' Exhibit 1 (June); and four of the five aldermen were elected by individual wards. Since that time, the City has adopted the changes which form the subject of the instant lawsuit: (1) the boundaries have been extended three times, in 1965, 1966 and 1968, so that a substantial number of people and prospective voters (predominantly white) live in areas which are now for the first time within the City; (2) the polling places have been moved; and (3) the aldermen are now to be elected by the voters of the City at large. It is stipulated that the City of Canton has neither obtained the declaratory judgment required by section 5 of the Voting Rights Act nor submitted the new changes to the Attorney General. Stipulation, para. 3.

On May 1, 1969, the plaintiffs filed a suit attacking the annexations and the change in polling places, and seeking to prevent the City from holding elections in accordance with these changes.[2] On May 9, 1969, the plaintiffs' motion for a temporary restraining order was heard by the Honorable Walter L. Nixon, Jr.,

[2] When the original complaint was filed, plaintiffs were not aware that the earlier elections had been held by wards, so the change to at-large elections was added in an amendment on May 30, 1969. When the original complaint was filed, plaintiffs were also unaware of the 1965 annexation, so it, too, was omitted.

United States District Judge, Southern District of Mississippi.

May Hearing. Evidence at the hearing included testimony that the annexations had brought in several hundred people (predominantly white), while adjacent areas with similar numbers of black people were not annexed. Transcript (May) 23-29, 49-51; Plaintiffs' Exhibit 8 (May). There was also testimony about the polling places, particularly those in the two heavily black wards, which indicated that the polling place for Ward 4 had been moved some distance from its former location in the City square, and was now located near the annexed white area, Transcript (May) 31-35, and that the polling place in Ward 3 had been moved to the former City Jail. Transcript (May) 35-39; Plaintiffs' Exhibit 1 (May). Evidence of black people's fear of the jail, based on previous history, was excluded. Transcript (May) 40-42. The defendants sought to establish that the changes had been made in good faith and without any intent to discriminate, Transcript (May) 82-96, but this was excluded (except for testimony that proprietors of the former polling places had refused permission to use these places again, Transcript (May) 89, on the ground that neither Judge Nixon nor the three-judge court, when it heard the merits, had the "function or prerogative" of determining the motives of the City in making the changes:

> "The only questions to be decided by this three judge court in the final analysis, the three judge court to be designated, is whether or not the State of Mississippi or any of its political subdivisions have acted in such a way as to cause or constitute a voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting within the meaning of Section 5 of the

> Voting Rights Act of 1965, which changed the situation as it existed as of November 1, 1964, and whether or not prior to doing so the City had filed a request for declaratory judgment with the United States District Court for the District of Columbia or asked the approval of the Attorney General of the United States as required by Section 1973." Transcript (May) 127.

Judge Nixon went on to hold that the boundary extension was comparable to the shift from individual district elections to countywide elections for county supervisors, which was held by this Court in *Fairley* v. *Patterson* (*sub nom. Allen* v. *State Board of Elections*), 393 U.S. 544 (1969), to come within section 5 of the Voting Rights Act of 1965. Finding that the City had obtained neither the declaratory judgment nor the Attorney General's approval, Judge Nixon held that there was a sufficient probability that the full three-judge court would hold section 5 barred the boundary extensions to justify enjoining the elections; accordingly, he entered a temporary restraining order postponing the elections.[3]

On June 2, 1969, the case came on for hearing before the three-judge court (Coleman, Cir. J., and Cox and Nixon, Dist. JJ.), with the issues now including all three boundary extensions and the change from ward elections to at-large elections (added by amendment on May 30, 1969), as well as the removed polling places.

June Hearing. Additional evidence at the June hearing focused primarily on establishing more detailed population and registration figures for the City

---

[3] Judge Nixon did not deal directly with the question of the removed polling places in his opinion.

as a whole and for the annexed areas. This evidence showed that, on about January 12, 1969, shortly before the deadline for qualifying to vote in the 1969 elections, there were 2,794 black voters registered and 2,052 white voters. On April 25, 1969, shortly after the deadline for voting in 1969, there were 3,042 black voters and 2,953 white voters (broken down by wards according to the figures shown on page 8, *supra.*)

There was also evidence about the number of black and white persons who live in the areas brought into the City by the respective annexations:[4]

Annexation Year	Blacks	Whites
1965	46 (est.)	0
1966	28	187
1968	8	144[5]

The three-judge court, unlike Judge Nixon, allowed a defense witness to testify about the reasons for changing the polling places. Transcript (June) 46-53. Finally, there was argument, but no testimony, that the change from ward elections to at-large elections was done to comply with the 1962 amendments to Mississippi Code § 3374-36, which had been in effect but not followed at the previous municipal elections in 1965.

On July 17, 1969, the three-judge court rendered its opinion, discussing each of the changes in turn, and

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[4] There was also testimony concerning the number of people residing in the annexed areas at the time they were brought in, which figures were later cited in the court's opinion.

[5] The figure of 46 blacks added by the 1965 annexation was a stipulated estimate. (Transcript (June) 9, 54-55. The 1966 and 1968 figures are based on the actual physical examination by the City's witness. Plaintiffs' Exhibit 7 (June).

holding that no injunction was warranted as to any of them. The court accordingly set aside the temporary restraining order and dismissed the complaint. In contrast to the approach of the single judge, the three-judge court examined the motives of the City in making each change, and concluded that since no improper motive had been shown, there was no violation of section 5:

(1) As to the expansion of boundaries, the court asked whether section 5 was intended to cover boundary extensions where black voters remained in the majority, and concluded in the negative:

> "Applying the full reach of the Act, Congress could not have intended such a result unless it were shown to be a strategem deliberately designed to overturn a black majority at the municipal polls."[6]

(2) As to the change from individual ward elections to at-large elections, the court held that the 1962 state statute requiring at-large elections could not have been passed to thwart the 1965 Voting Rights Act, and that the City was therefore justified in complying with it in 1969 (while noting that there was no evidence in the record showing why the City had not complied in 1965 nor why the City wished to change).

(3) Finally, as to the polling places, the court held that the changes had been necessary because two of the former polling places were too crowded and the

---

[6] In calculating the effect of the annexations, the court used the number of people living within the affected area at the respective times of their annexations, rather than the number of people living within those areas at the time of the election.

other two were on private property whose owners had withdrawn their permission to use the space.

In thus holding that the plaintiffs' contentions were not well taken, the court did not at any point hold that any of the changes was not a "voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting."

Judgment was entered on July 24, 1969, dismissing the complaint and authorizing the City of Canton to proceed with its elections. This appeal followed.[7]

THE QUESTIONS ARE SUBSTANTIAL

Those states, including Mississippi, which have traditionally deprived blacks of the right to vote have displayed great ingenuity in raising new barriers of discrimination to circumvent successive checks imposed by Congress and the courts. In passing the Voting Rights Act of 1965, Congress therefore barred these states and their subdivisions both from using "any test or device" as a prerequisite to voting and from making any changes in their voting and election procedures without first satisfying federal authorities that the changes would not have the purpose or effect of discriminating against black people.

Only last Term, this Court exhaustively examined section 5 in *Allen* v. *State Board of Elections, supra,* which involved three cases from Mississippi and an-

---

[7] After the notice of appeal was filed, the City of Canton set new election dates beginning with the first primary to be held on October 7, 1969. On September 5, 1969, plaintiffs moved to stay that portion of the order authorizing the elections to proceed and to enjoin the elections pending the appeal to this Court. This motion was denied, Coleman, J., by an order filed September 23, 1969.

other from Virginia. The Court examined the background, legislative history and structure of the Act, and concluded that section 5 covered each of the cases before the Court:

> "We must reject a narrow construction that appellees would give to § 5. The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race. Moreover, compatible with the decisions of this Court, the Act gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.' 79 Stat. 445, 42 U.S.C. § 1973*l*(c)(1). . . .
>
> "The legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way." 393 U.S. 544, at 565-66 (footnote omitted).

The Voting Rights Act was an attempt to enforce the guarantees of the fifteenth amendment fully, after earlier measures had failed. The coverage is thus as broad as that of the fifteenth amendment itself. This Court's fifteenth amendment cases make it clear that "[t]he Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." *Lane* v. *Wilson,* 307 U.S. 268, 275 (1939). And, as this Court held in *Reynolds* v. *Sims,* 377 U.S. 533, 555 (1964), "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's

vote just as effectively as by wholly prohibiting the free exercise of the franchise."

The two most significant changes involved in this appeal are familiar from earlier cases dealing with voting rights. The change from individual ward elections to at-large elections was explicitly held to be covered by section 5 in one of the cases decided with *Allen: Fairley* v. *Patterson, supra.* The expansion of the boundaries is an equivalent dilution of the votes of City residents, including blacks, of the sort held to violate the fifteenth amendment's voting guarantees in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). Finally, the change in polling places clearly has a direct effect upon voting, of a sort that might well have a discriminatory purpose or effect.

The district court does not appear to have held that these were not changes in voting practices or procedures. Rather, the court examined the motives and effects of the three changes and held that they were all nondiscriminatory changes made in good faith. Yet, it is abundantly clear under the statute that this inquiry is beyond the functions and prerogatives of the local district court, and is committed solely to the jurisdiction of the United States District Court for the District of Columbia or of the Attorney General of the United States.

This limited function was recognized by the single judge when he granted the temporary restraining order. Referring to the changes, he said:

> ". . . I don't think they were done for the reason that the Plaintiffs or Petitioners herein allege they were done for, but at the same time that question or that matter of determination by me has been completely taken away by the laws enacted by the

Congress and by the decision of the United States Supreme Court in Allen versus State Board of Elections. I am not to determine that. All I can determine under the law is whether or not there has been such a change in standard, practice, or procedure of voting qualifications or prerequisites than those that existed on November 1st, 1964, and after that—without approval, which has been stipulated that that has not been requested and without that we can't go any further in this case." Transcript (May) 88.

"I am powerless to decide this case on the question of motive. That is a matter that the Congress and the United States Supreme Court has said is left up to the Attorney General of the United States and the District Court for the District of Columbia. It completely deprives the United States District Courts of the districts in which these matters come up and arise from making a determination in the matter." Transcript (May) 92.

"... the three judge court in my opinion has no more power than I do at this particular time to determine whether or not this was done in good faith or what the effect will be. Once it is not [*sic*] determined that there has been a change in voting qualifications, standards, practice or procedure, that is as far as that court can go. If the three judge court finds that there is, or has been a change in the voting qualifications or standard or practice or procedure with respect to voting by the annexation of these new areas by the City of Canton, a political subdivision of the State, then the three judge court is duty bound in that event to issue an injunction and enjoin the holding of this election by participation of the voters in the newly annexed area." Transcript (May) 96.

The single judge also correctly held that in presenting its case to the Attorney General or to the Dis-

trict of Columbia court, the City of Canton would bear the burden of showing a nondiscriminatory purpose and effect:

> ". . . At that time the City of Canton then has the burden of going to the Attorney General of the United States and seeking his approval to hold that election by allowing the voters in the newly annexed areas to participate in the election of the City of Canton, or by filing an action in the District Court of the United States for the District of Columbia to obtain a declaratory judgment that this annexation was not had for the purposes prohibited by the Voting Rights Act of 1965.
>
> "That's the time the City would be required and should put on its proof with respect to why this was done and what was intended and whether or not it was normal business of the City and whether or not it was designed to deprive any citizen of his rights under the Fourteenth and Fifteenth Amendments of the United States Constitution." Transcript (May) 96.

The three-judge court, however, went into the purpose and effect of the City's changes, and assumed the function, as Judge Coleman observed, of deciding their validity. Transcript (June) 31. But this is precisely the question which section 5 says must be decided in the District of Columbia. Thus the lower court here had no power under section 5 to decide whether the annexations were made in good faith, nor whether annexing white areas while leaving out surrounding black areas showed a discriminatory purpose or effect; and, of course, the lower court had no power to decide, as it did, that decreasing a black majority without wholly erasing it is not discriminatory.

Similarly, the lower court had no power to decide that the City's decision to obey the 1962 statute which

it had previously ignored was nondiscriminatory.[8] Finally, the lower court had no power to decide that the reasons advanced for moving the polling places were acceptable.[9]

---

[8] Sudden adherence to previously ignored laws is a familiar discriminatory device that has been enjoined in many "freeze doctrine" cases, *see* Louisiana v. United States, 380 U.S. 145 (1965), including at least one brought under section 5. Vanover v. Maloney, Misc. No. 581 (4th Cir. July 16, 1969) (Opinion of Butzner, J., denying a stay pending appeal), in which the court enjoined the enforcement of the party loyalty oaths of Virginia Code §§ 24-253, 24-367 and 24-368, in Dickenson County, Virginia, on the ground that they had never been enforced there before November 1, 1964, and therefore must be approved under section 5.

[9] The polling places in the two heavily black wards were moved to the old, dilapidated jail (Ward III) and to a location close to the newly annexed, predominantly white area (Ward IV). *Compare* the remarks of Representative McCulloch (one of the floor leaders of the Voting Rights Act) during the 1969 hearings on extending the Act:

> "Mr. Chairman, I should like to make the comment there that in due course it is my intention to introduce legislation that will get to this very kind of action in some of the northern states. You know most of us never took the position that we are without sin up there, and the movement of voting places on short notice in certain sections of the north has been notorious for the last three or four or five elections." Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, on H.R. 4249 and Similar Measures, held on June 19, 1969, at p. 18 (typed transcript).
>
> • • • • •
>
> "We hope to prevent that by a general election reform legislation, which I intend to offer very shortly. We happen to have some data that would indicate that in some cities in the north this quick change of polling places might have had in part the very reason that you stated, but the major thrust in some cities was to deprive certain people, parties if you please, from finding the place to vote." Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, on H.R. 4249 and Similar Measures, held on June 19, 1969, at p. 22 (typed transcript).

CONCLUSION

This case is critical in achieving the Congressional purpose underlying the Voting Rights Act. Until this Court decided the Virginia case and the three Mississippi cases involved in *Allen* v. *State Board of Elections, supra,* no court had ever enforced section 5. In *Allen,* this Court made its ruling prospective; thus relief was impossible, even though the Attorney General of the United States has since found that each of the three Mississippi statutes involved in *Allen* is discriminatory. Letter, Jerris Leonard to A. F. Summer, May 21, 1969.[10]

The changes in the instant case, as Judge Nixon recognized, are crystal clear changes in voting practices or procedures, and no court or judge has held at any time they are not. Relief, however, has been denied. Unless this Court reverses the judgment in this case and requires the enforcement of the clear mandate of section 5, Mr. Justice Harlan's prophecy in *Allen* will come to pass, and the Voting Rights Act will never play the full role Congress intended for it.

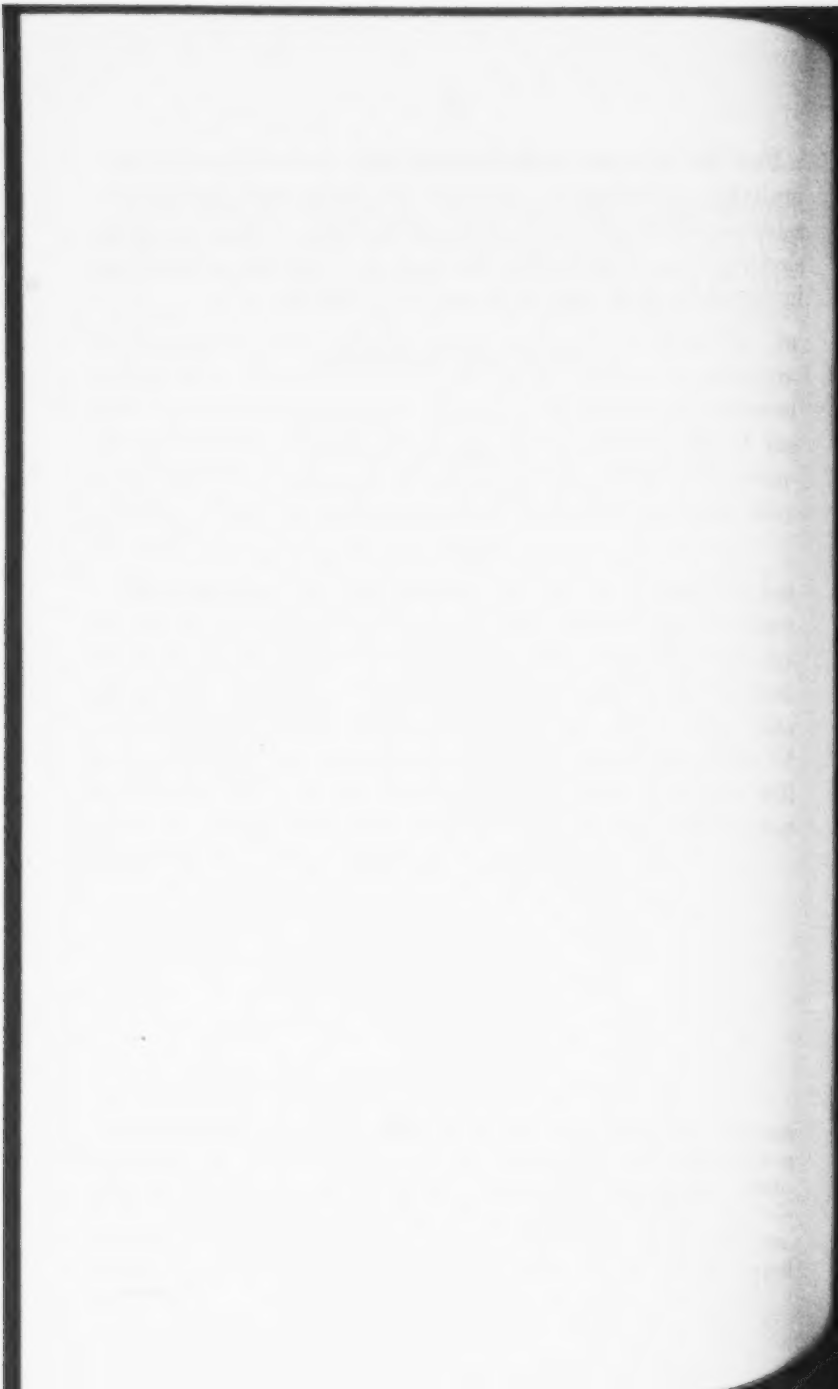
---

[10] The burden on the states is not heavy where *legitimate* statutes are involved. As of July 11, 1969, only ten of the 345 statutes submitted to the Attorney General had been disapproved. Statement of John N. Mitchell prepared for Hearings Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, on S. 2507, held on July 11, 1969, at pp. 19-20 (typed transcript).

For the reasons stated above, this Court should note probable jurisdiction, reverse the judgment below, set aside the elections held in October 1969, and order new elections in which the changes in voting procedure involved in this case may not be enforced.

Respectfully submitted,

ARMAND DERFNER
JAMES A. LEWIS
TAUNYA L. BANKS
603 North Farish Street
Jackson, Mississippi
Attorneys for Appellants



APPENDIX

APPENDIX A

[Filed July 17, 1969]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION No. 4464

ERNEST PERKINS, ET ALS., *Plaintiffs*,

v.

L. S. MATTHEWS, ET ALS., *Defendants*.

Before COLEMAN, Circuit Judge, COX, Chief District Judge, and NIXON, District Judge.

COLEMAN, Circuit Judge.

1. THE CONTROVERSY.

Twelve days prior to the date prescribed by law for the holding of Democratic municipal primaries throughout Mississippi, the plaintiffs filed their suit in the District Court. They complained that in 1966 and 1968 the City of Canton, Mississippi, had extended its municipal boundaries, that this caused a large number of white voters to be included in the City, and that this diluted the effectiveness of the vote of newly enfranchised black citizens. It was said that this, in the absence of a submission to the United States Attorney General or a declaratory judgment from the United States District Court for the District of Columbia, was a failure to comply with 42 U.S.C. § 1973c, the Voting Rights Act of 1965.[1]

---

[1] Enacted August 6, 1965, applicable to changes with respect to any voting qualifications, standard practice, or procedure different to that in force on November 1, 1964.

The complaint also lodged a similar attack against the re-location of polling places within the four wards of the City of Canton.

May 8, 1969, pursuant to a hearing, Judge Nixon granted a temporary restraining order enjoining the holding of the municipal primaries scheduled for May 13 pending the disposition of the case on the merits. No election has been held and the encumbents are holding over in their respective offices, as provided by Mississippi law.

May 15, 1969, the Chief Judge of this Circuit constituted a Three-Judge Court composed of Judges Coleman, Cox, and Nixon.

By leave of the Court, May 30, 1969, the plaintiffs added a third count. This alleged that prior to 1969 four members of the Board of Aldermen in the City of Canton were elected by wards. The complaint acknowledged that in 1962, prior to the enactment of the Voting Rights Act of 1965, the Mississippi Legislature enacted a general statute, amending existing law, to provide that Aldermen in all municipalities of less than ten thousand population shall be elected by a vote of the entire electorate of the municipality, each required to reside in the ward which he proposed to represent on the town council.[2] It was alleged as a fact, which is the fact, that Canton did not comply with this law in the municipal elections of 1965, but followed the old statute, that is, the four aldermen were elected by wards.

In 1969, Canton proposed to comply with the 1962 statute. Plaintiffs say that this would be a change from the procedure in effect on November 1, 1964, and was thus invalid until either submitted to the Attorney General or to the United States District Court for the District of Columbia, as in other cases.

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[2] Chapter 537, Laws of Mississippi of 1962, Mississippi Code of 1942, § 3374-36.

2. The Decision.

We have heard this case on stipulations of the parties, exhibits, and oral testimony adduced in open court. We find and hold that under the facts of this case the contentions of the plaintiffs are not well taken, that the temporary injunction should be dissolved, and the qualified electors of the City of Canton should be free to hold an election in compliance with the 1962 statute.

3. The Facts.

Canton had a population of 9,707 at the last federal census. Approximately 5,900 are registered to vote in municipal elections.

Based on an average index of two voters per residence, which the plaintiffs do not challenge, the 1965 expansion of the Canton city limits brought into the City 46 black voters and no white voters. Plaintiffs do not attack this expansion. The 1966 expansion brought in 28 black voters and 64 white voters. The 1968 expansion brought in 8 black voters and 112 white voters. The sum total of the voters brought within the city limits by the three extensions would be 82 black voters and 176 white voters, or a majority of 94 white voters among those annexed in all three expansions.

One of the plaintiffs, who was a candidate for Mayor in the Democratic primary scheduled for May 13 [which office would have been voted upon city at large in any event] testified that as of January 12, 1969, there were 2052 white voters in Canton and 2794 black voters, a majority of 742 black. He further testified that between January 12 and February 3 approximately 800 white voters registered in the city and only 150 black voters registered. It is to be noted that the figure of 800 new white registrants as contrasted to only 150 black registrants was not supported by documentary evidence but represented the wit-

ness's best judgment after an observation of the registration books. If there were 800 new white registrants after January 12 only 176 could have come from the annexed areas, even if all had waited until then to register. In any event all the witnesses agreed that regardless of the 94 net gain in the white vote, brought about by the expansions, the majority of the electorate in the City of Canton are black.

4. Conclusions of Law on the Applicability of the Act to the Expansions.

We are therefore confronted with the question: Did Congress intend (in the affected states) to freeze municipalities to their existing boundaries, prohibiting any municipal expansion even though, as in this case, the annexations included a white majority of 94 in a total voting population of 6,000, not destroying a black majority?

We have been cited nothing to show that Congress either thought of such or intended it. Applying the full reach of the Act, Congress could not have intended such a result unless it were shown to be a stratagem deliberately designed to overturn a black majority at the municipal polls. In Canton, Mississippi, the black voters still had a majority of not less than 600 after the expansions were effected. It is significant that the first expansion brought in 46 black voters and no white voters at all. Moreover, the City has expended over three quarters of a million dollars bringing municipal services to the annexed area, including the all-black annexation of 1965.

We therefore hold that these annexations were not violative of the Voting Rights Act of 1965.[3]

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[3] Under Mississippi Law, municipalities may neither expand nor contract their corporate limits at their unfettered discretion. To do either they must petition the Chancery Court, where any party in interest may object and litigate his objections. Mississippi Code 1942, § 3374-10, et seq.

5. Compliance With the Municipal Election Law of 1962.

On March 26, 1962, the Supreme Court decided Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L. Ed. 2d 663. On May 24, 1962, the Mississippi Legislature, by and with the approval of the Governor, enacted Chapter 537 of the Laws of Mississippi of 1962, entitled "AN ACT providing for the city-wide election of all individuals comprising the governing authority of any municipality". The Act amended the previously existing § 3374-36, Mississippi Code of 1942 and concluded with the following language, not heretofore in the statute:

> "All aldermen shall be selected by vote of the entire electorate of the municipality. Those municipalities which determine to select one alderman from each ward shall select one of the candidates for alderman from each particular ward by a majority vote of the entire electorate of the municipality".

Plaintiffs do not attack the validity of this amendment. They say it should not be observed in Canton in 1969 because it was not observed in 1965.

This enactment preceded the Voters Rights Act of 1965 by a little over three years. It permitted the requirement that an alderman should reside in the ward he proposes to represent, but the choice is left to all the voters in the municipality, each having an equal voice in the selection of the governing authorities of the city. This complies with the Constitutional requirement of one man—one vote, Dusch v. Davis, 387 U.S. 112, 87 S.Ct. 1554, 18 L.Ed. 2d 656 (1967).

We have previously pointed out that in the municipal elections of 1965 Canton did not comply with the 1962 law. The reasons for non-compliance are not shown. In any event, plaintiffs wish to continue the invalid 1965 pro-

cedure of allowing each ward to elect its alderman for the reason that in one ward Negro citizens are in the overwhelming majority, leaving them in the position, if they wished, of voting on racial considerations alone and thus having at least one Negro on the City Board.

If race alone is to govern the outcome of elections as well as the official acts of city legislative bodies, it is obvious that if the procedure desired by the plaintiffs were approved then the one Negro member of the Board would always be outvoted by the four white members. His presence on the City Board would, in practical effect, amount to nothing beyond the presence of a black man who could always cast his dissenting vote. Since a majority of the voters in Canton are black it is equally true that under the 1962 Act the black voters have the power, if they wish to be influenced by race alone to elect an all black governing body.

We do not think, however, that this issue is to be decided by these considerations.

In the first place, the City of Canton should obey the one man—one vote rule. In the second, the 1962 Act antedates the Voting Rights Act of 1965, and could not have been enacted for the purpose of thwarting the latter. In the third, it is axiomatic that a violation of the law in the elections of 1965 does not justify continued violations. The City should comply with the law in 1969, regardless of whether it complied in 1965. Indeed, non-compliance in 1969 would invalidate the election if a challenge were to be raised. We are not impressed with the argument that Congress intended to freeze unlawful election procedures. Unlawful election procedure, insofar as the Fifteenth Amendment applies, is what the Act intends to stop. Moreover, the state statute requiring that aldermen be elected by all the voters of the municipality, instead of from individual wards, brings cities in compliance with the one man —one vote rule, leaving to all the inhabitants an equal

voice in the election of their municipal officials, something which Congress could not abrogate without a Constitutional Amendment.

We are therefore of the opinion that the contentions of the plaintiffs on this issue are not due to be sutsained.

6. The Change in Polling Places.

We find no merit in the attack upon the changes made in the location of the polling places. The evidence on this issue is undisputed. The same number of polling places will remain in each city ward. No voter will have to go outside his ward to vote. The changes were made necessary because one place did not have space for voting machines, two others had to be moved because they had been situated on private property (bank lobbies) and permission to use the space had been withdrawn, and another was moved out of the courthouse to a school building because facilities were more ample and the move eliminated any interference with sessions of the various courts sitting at the courthouse.

This opinion constitutes our findings of fact and conclusions of law in this case, Rule 52(a), Federal Rules of Civil Procedure.

Judgment may be entered by any Judge of the Court, for the Court, dissolving the temporary injunction and dismissing the complaint.

This July 17th, 1969.

s/ Jas. P. Coleman
United States Circuit Judge

s/ Harold Cox
United States Chief District Judge

s/ Walter L. Nixon, Jr.
United States District Judge

APPENDIX B

[Filed May 12, 1969]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NUMBER 4464

ERNEST PERKINS, ET AL., *Plaintiffs.*

v.

L. S. MATTHEWS, ET AL., *Defendants.*

Oral Opinion of the Court

This is an action brought by Plaintiffs who are all Negroes and candidates for City offices in the City of Canton, Mississippi, against the Mayor and Board of Aldermen of the City of Canton, the Democratic Municipal Executive Committee of the City of Canton and the Municipal Election Commission of the City of Canton, Mississippi, based on 42 U.S.C. Section 1973(C) and 1983 for declaratory and injunctive relief against the Defendants' 1966 and 1968 extensions of the Municipal Boundaries of the City of Canton, Mississippi, to include a substantial number of additional, as alleged, white voters and against Defendants' selection of polling places for the May and June 1969 Municipal Primary and General Elections, on the grounds that the boundary extension and the selection of polling places each is a change in practice and procedure with respect to voting in a political subdivision covered by 42 U.S.C. Section 1963 B(a) [sic: § 1973b(a)] and may not be enforced with 42 U.S.C. 1973 C and on grounds that the boundary extension and the selection of polling places deny or abridge Plaintiffs' right to vote and have their vote counted in violation of the Fourteenth and Fifteenth Amendments to the Constitution of the United States. Jurisdiction of this Court is based on 28 U.S.C. Sections 1343 (3, 4), Sec-

tion 1973C and Section 2201. Three Judge Court has been requested as required by 42 U.S.C. 1973C and this request has been sent by this Court to the Chief Judge of the Court of Appeals for the Fifth Circuit asking that a three judge court be designated to hear this matter, that is, the declaratory judgment and injunctive features thereof. This Court today is hearing this motion for temporary restraining order which was filed and noticed by the Plaintiffs or Petitioners herein, and the only question before this court at this time is whether or not irreparable injury would be caused Plaintiffs if the temporary restraining order were not issued pending the hearing of this matter before a Three Judge Court as required by law and as set forth in the recent case of Allen v. State Board of Elections, Et al., which was decided by the unanimous United States Supreme Court through Chief Justice Earl Warren on March 3, 1969, which was a case that emanated from the State of Mississippi and which involved, among other things, the county-wide voting for all members of boards of supervisors in various counties as authorized by the Mississippi Legislature and which changed the office of the election commissioners for each county from an appointive to an elective office, and also dealt with absentee voting.

The Court, having heard testimony and arguments of counsel and having considered the pleadings and exhibits and all other evidence in this case finds that it has jurisdiction of this matter for determining the question of temporary restraining order and finds that the City of Canton in 1966 and in 1968 extended its municipal boundaries to include additional areas with additional voters residing therein, and finds that there is no proof that these extensions were enacted or put into effect by the City of Canton for the purpose of denying anyone any voting right or to deny anyone any right guaranteed by the Fourteenth and Fifteenth Amendment of the United States Constitution, however the case of Allen versus State Board of Elections held that it is not the function or prerogative

of this Court, even if it were now sitting as a three judge court, to determine the motive of the City in extending its boundary. The only questions to be decided by this three judge court in the final analysis, the three judge court to be designated, is whether or not the State of Mississippi or any of its political subdivisions have acted in such a way as to cause or constitute a voting qualification or prerequisite to voting or standard, practice or procedure with respect to voting within the meaning of Section 5 of the Voting Rights Act of 1965, which changed the situation that existed as of November 1, 1964, and whether or not prior to doing as the City had filed a request for declaratory judgment with the United States District Court for the District of Columbia or asked for approval of the Attorney General of the United States as required by Section 1973. It is stipulated that the City did not take either one of this actions, therefore the only questions before this court at this particular time are whether or not the extension of the boundary of the City of Canton, Mississippi, constituted an act or enactment which changed or affected the voting qualifications or prerequisite to voting or standard, practice or procedure with respect to voting within the meaning of Section 5 of the Voting Rights Act of 1965. And if the Court finds this to be the case, that is, the three judge court to be designated, then in that event it will have no alternative but to grant the relief requested, in part at least.

The Court finds that the extension of the boundaries of the City of Canton, a political subdivision of the State of Mississippi, was such an action to be comparable to the authorization by legislative enactment of the State of Mississippi, of county wide voting on boards of supervisors within certain counties which has been held by the United States Supreme Court to constitute the prohibited action of Section 5 of the Voting Rights Act of 1965.

Therefore the Court finds and is of the opinion that extension of the boundaries of the City of Canton, Missis-

sippi were such enactments or actions which did affect or change the standard practice or procedure with respect to voting that existed on November 1, 1964 in the City of Canton, Mississippi.

The Court further finds that at least one the Plaintiffs or Petitioners, namely, Ernest Perkins, is a candidate in the Democratic Primate for alderman for Ward Three of the City of Canton, and that the other plaintiffs are independent candidates who would be affected at least indirectly through the results, or by the results of the Democratic Primary which would select their opponents in the General Election. Ernest Perkins would be directly affected by the holding of said Democratic Primary elections on this coming Tuesday, May 13, 1969.

The Court therefore finds that Section 1973 of 42 U.S.C. were not complied with and therefore, under Section 5 of the Voting Rights Act of 1965, that there was a change in the standard, practice or procedure as set forth therein without the approval of the Attorney General nor the United States District Court for the District of Columbia. However, this matter is to be finally determined by the three judge court and this court does not purport to substitute its judgment at this time for the three judge court nor to speak finally with respect to this court's opinion on this matter, but does find that there is such a question present and such a probability that the three judge court would so find that to deny a temporary restraining order at this time would cause irreparable harm and injury, not only to Plaintiffs but to other candidates in said election, to the electorate or qualified voters.

This court finds that Plaintiffs are not entitled to the relief requested with respect to enjoining or temporarily restraining of the Democratic Primary by prohibiting those in the newly annexed areas from voting and allowing the primary election to be held through the casting of ballots by only qualified electors residing within the City of Canton, November 1, 1964. It is impossible to deter-

mine at this late date, and incidentally the Court notes that this complaint and motion for temporary restraining order were not filed until May 1, 1969 and noticed for hearing on this date, and the Court has given to the Plaintiffs speedy hearing on the date that they requested, namely, today May 9th, 1969, that to give the Plaintiffs the relief that they requested as just previously stated would result in chaos, confusion, probable election contests and other legal action on the part of those who would be deprived and prevented from voting, particularly if the three judge court designated to hear this case decides that there was no violation of Section 5 or any change in the standard, practice or procedure with respect to voting within the meaning of Section 5 of the Voting Rights Act of 1965.

Therefore, it is the opinion of this court that the Democratic Municipal Election that was to be held in the City of Canton, Mississippi on May 13, 1969 will be enjoined in toto provided the Plaintiffs post a bond as required by law in the amount of $2,500.00, in view of the testimony given herein concerning the costs of advertisements, supplies, rental of voting machines by the City of Canton from Madison County.

Counsel for the Plaintiffs will prepare this order granting this temporary restraining order on this basis provided said bond is posted as required by law and by this order and will submit it to the attorney for Defendants for approval as to form and present this order to the Court on Monday, May 12, 1969.

In the absence of the posing of the required bond, the Motion for Temporary Restraining Order will be overruled and denied.

The above and foregoing Opinion delivered in open court at the conclusion of the hearing on the above referred to Motion on May 8, 1969, and hereby ordered to be made a part of the record in this cause.

/s/ WALTER L. NIXON, JR.
United States District Judge.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 670

ERNEST PERKINS, et al.,
Appellants,

vs.

L. S. MATTHEWS, Mayor of the City
of Canton, et al.,
Appellees.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES,
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, L. S. Matthews, Mayor of the City of Canton, et al., Appellees, moves that the judgment of the District Court be affirmed.

QUESTIONS PRESENTED

1. Whether the District Court erred:

(a) In finding that the extension and enlargement of the corporate boundaries of a municipality does not come within Section 5 of the Voting Rights Act of 1965.

(b) In finding that the redesignation of polling places for the municipal primary and general elections does not come within Section 5 of the Voting Rights Act of 1965.

(c) In finding that the election of aldermen from wards but by a majority vote of the entire electorate of the municipality, pursuant to a 1962 statute of the State of Mississippi, does not come within Section 5 of the Voting Rights Act of 1965.

STATEMENT OF CASE

The City of Canton, Mississippi, is a code charter municipality under the Laws of the State of Mississippi, and operates under an aldermanic form of government consisting of a mayor, an alderman at large and one alderman from each of the four wards into which the city is divided.

The population of the city according to the 1960 Census was 9,707. The estimated population at the time of the filing of the suit in question is 12,000. At the time of the filing of the suit there were 5,995 qualified electors in the city of which 3,042 were black and 2,953 were white.

THE ANNEXATIONS

In the later part of 1962, or early 1963, the governing authorities formulated a long range plan for boundary extensions, for the future growth and development of the city, giving priority to the annexation of an area to the south, then to the east and last to the north. Because of

the magnitude of the project and the expenditures involved, the annexations could not be made at one time but only over a period of years, and only after the expenditure of approximately $400,000.00 to extend and improve the city's sanitary sewerage collection and disposal system. The necessary sewerage improvements were completed in early 1964. In 1965 the city annexed the area to the south, in 1966 the area to the east and in 1968, the area to the north, all as shown on the map furnished by Appellees, but introduced in evidence in this cause by agreement as Appellants-Plaintiff's Exhibit 2, at the June 2nd hearing before the Three-Judge District Court. The annexations are also set forth in paragraphs 5, 6 and 7 of the Stipulation introduced as Appellants-Plaintiff's Exhibit 1 at that hearing. Each of such annexations were done in accordance with the Laws of the State of Mississippi, including the ratification and approval thereof by the Chancery Court of Madison County, Mississippi. The municipality has expended approximately $750,000.00 for utilities and sewerage improvements and extensions in these areas, as shown by paragraphs 8 and 9 of the Stipulation. The parties stipulated and the lower court found that the racial composition of the adult population of the annexed areas at the time of annexation was:

Annexation	Population	Black	White
1965	46	46	0
1966	92	28	64
1968	120	8	112

THE POLLING PLACES

In April of 1969, the Mayor and Board of Aldermen, as required by law, adopted a resolution designating the polling places to be used in the 1969 municipal primary and general elections. This resolution was published in

the Madison County Herald, a newspaper published and of general circulation in the City of Canton, Mississippi, as required by law. In addition, the location of the polling places was widely advertised as a news item in the paper for several weeks. The polling places so designated were different from the ones used at the 1965 elections, which were the last municipal elections held after November 1, 1964, prior to the filing of the complaint in this suit.

In regard to the election of aldermen, *Miss. Code Ann.* (1942-Recompiled) Section 3374-36, approved May 24, 1962, provides:

> § 3374-36. Number of aldermen and wards-selection of aldermen. In all municipalities having a population of less than ten thousand (10,000), according to the latest available Federal Census, there shall be five (5) aldermen, which aldermen may be elected from the municipality at large, or in the discretion of the municipal authority, the municipality may be divided into four (4) wards, with one alderman to be selected from each ward and one from the municipality at large. On a petition of twenty per cent (20%) of the qualified electors of any such municipality, the provisions of this Act as to whether or not the aldermen shall be elected from wards or from the city at large shall be determined by the vote of the majority of such qualified electors of such municipality voting in a special election called for that purpose. All aldermen shall be selected by vote of the entire electorate of the municipality. Those municipalities which determine to select one aldermen from each of the four (4) wards shall select one from the candidates for alderman from each particular ward who shall be a resident of said ward by majority vote of the entire electorate of the municipality.
>
> In all municipalities having a population of ten thousand (10,000) or more, according to the latest available Federal Census, there shall be seven (7) aldermen, which aldermen may be elected from the

municipality at large, or in the discretion of the municipal authority, the municipality may be divided into six (6) wards, with one alderman to be selected from each ward and one from the municipality at large. On a petition of twenty per cent (20%) of the qualified electors of any such municipality, the provisions of this Act as to whether or not the aldermen shall be elected from wards or from the city at large shall be determined by the vote of the majority of such qualified electors of such municipality voting in a special election called for that purpose. This bill in no way affects the number of aldermen, councilmen, or commissioners of any city operating under a special charter. *All aldermen shall be selected by vote of the entire electorate of the municipality. Those municipalities which determine to select one alderman from each ward shall select one of the candidates for alderman from each particular ward by majority vote of the entire electorate of the municipality.*

Prior to the passage of the Voting Rights Act of 1965, the city elected to be divided into four wards. The ward lines have not been changed since November 1, 1964.

Through error the 1965 elections were not held in accordance with this statute in that instead of electing four aldermen, one from each ward but by a majority vote of the entire electorate of the municipality, four aldermen were elected, one from each ward but by a majority vote of the electorate of the particular ward involved, as provided under the statute as it existed prior to the 1962 amendment. Thus, the city unintentionally followed the old law instead of the 1962 statute.

THE LITIGATION

The quadrennial municipal primaries were required by law to be held on May 13, and 20, 1969, and the general election on June 3, 1969.

On May 1, 1969, the Appellants filed a complaint in the United States District Court for the Southern District of Mississippi, seeking to enjoin the 1969 primary and general elections on the grounds that the 1966 and 1968 annexations and the change of polling places were within the Section 5 of the Voting Rights Act of 1965 and had not been approved either by the United States Attorney General or by a declaratory judgment of the United States District Court for the District of Columbia. The Appellants requested that the matter be heard by a Court of three judges and prayed for a temporary restraining order until the Court could be empaneled and convened.

On May 9, 1969, Honorable Walter L. Nixon, United States District Judge for the Southern District of Mississippi, issued an order temporarily restraining the elections until the complaint could be heard on its merits before a Three-Judge Court.

On May 30, 1969, the complaint was amended to include the method of electing the four aldermen as prescribed by *Miss. Code Ann.* (1942-Recompiled) Section 3374-36, as amended in 1962, on the ground that it had not been followed in past elections.

The Appellee-Defendants included the 1965 annexation as an issue by way of their answer to the complaint. The original and amended complaint neglected to challenge this annexation, which was the first under the city's long range boundary extension program and which included only black residents.

On June 2, 1969, the case was heard on its merits before a Three-Judge Court composed of Honorable J. P. Coleman, Circuit Judge and Honorable W. H. Cox and Honorable Walter L. Nixon, Jr., District Judges, on the Section 5 issue. The Appellants introduced no evidence

to support the allegations in the complaint pertaining to violations of the Fifteenth Amendment. On July 17, 1969, the Court rendered its opinion and on July 24, 1969, entered its judgment, dismissing the complaint, and finding that the issues raised by the complaint, as amended, did not come within Section 5 of the Voting Rights Act of 1965.

Subsequent thereto, the governing authorities of the city, reset the elections as follows: first primary, October 7, 1969, second primary, October 14, 1969, and general election, October 28, 1969.

The Appellants then moved the District Court for a stay of the elections pending appeal, which was denied by order entered September 12, 1969. The Appellants next applied to this Court for a stay and injunction pending appeal, which was denied on October 1, 1969, by Mr. Justice Black.

Accordingly, the municipal primary and general elections were held on the above stated dates, and officers were elected. They have been properly qualified and commissioned to hold the offices to which elected and have served in such capacities since November 1, 1969.

ARGUMENT

I.

The Annexation

There is no evidence in the record that the three annexations involved had any discriminatory purpose or effect. In fact, the Stipulation introduced in evidence undisputedly establishes otherwise, as does the Appellants' declination to pursue their original contention that a Fifteenth Amendment issue was involved. Therefore, the case

of *Gomillion* v. *Lightfoot*, 364 U.S. 399 (1960), is no authority for the contentions of the Appellants.

Also, Appellants respectfully submit, that the annexations are established by the evidence to have been required by the normal and orderly growth of a relatively small but progressive municipality, and not a sham to discriminate against the Appellants. Indeed, the city's expenditure of a sum in excess of $750,000.00, and the cost of other municipal services in the annexed areas, confirms this.

Therefore, the question is did Congress intend to include municipal expansions, admittedly non-discriminatory, within Section 5? Or stated otherwise, is the growth, and development of every municipality within the few states covered by the Voting Rights Act of 1965 subject to the discretion of the Attorney General or the District Court for the District of Columbia? Surely not. National policy is to promote growth, not stifle it, to encourage progress, not stagnation. In this respect, Appellees point out that an annexation in and of itself has no effect whatsoever upon the number of qualified electors in the municipality or racial composition of the electorate. The inhabitants of an annexed area must still fulfill the residency requirements in order to register to vote, and even then may never choose to do so. If they do choose to register, it is a personal decision and act, not an act of any political subdivision. Therefore, the annexations cannot be seriously said to constitute "a voting qualification or prerequisite to voting or standard, practice or procedure with respect to voting".

To hold that these undisputedly non-discriminatory annexations come within Section 5 and are therefore void, would unleash numerous and insurmountable problems.

Among them are the status of sales and ad valorem taxes collected over the years, in the annexed area, the jurisdiction of the police and fire departments, the effect on reduced fire insurance rates in the area, the status of municipal bonds issued for improvements in these areas, the status of zoning, building, housing and plumbing codes.

Thus, it is submitted that the District Court was correct in deciding that the annexations are not within the scope of Section 5.

II.

The Polling Places

The polling places were changed for reasons of necessity and convenience to the voters. As previously stated the City is now and was on November 1, 1964, divided into four wards. The ward lines have not been changed since 1963, and are shown on the map introduced in evidence below as Appellants-Plaintiff's Exhibit 2. Under Mississippi Law, there must be a polling place within each of the four wards. The polling places for Wards II and III at the 1965 elections were located in bank lobbies. The owners would not permit their use at the 1969 elections because of the disruptive effect on business. These polls had to be moved, so new polling places were designated. The polling places for Wards I and II used in the 1965 elections did not have adequate parking facilities or space to accommodate the increased number of voters or voting machines, which were to be used for the first time, replacing paper ballots previously used. Therefore, these two were moved to insure an orderly and efficient election for the convenience of the electors. Thus, the change in polling places was a matter of necessity, and not of choice. There was nothing else the election officials could do and faithfully discharge

their duties to the electorate of insuring conveniently accessible, spacious, and efficient facilities so that all who choose to vote might vote without undue delay.

Clearly such minor election procedures as this was not intended by Congress to be covered by Section 5, and the District Court did not err in so holding.

III.

Method of Electing the Aldermen

Through mistake, misrepresentation, ignorance or a combination thereof, the 1965 primary and general elections of the aldermen from the four wards were not held as required by the 1962 statute. In 1969, the city sought to rectify this situation and to follow the law in keeping with the "one-man-one-vote" rulings of this Court. It should be pointed out that a majority of the voters were black. Thus, the city's action in effect extended the black majority to all four wards rather than confining it to two wards as it would have been under the method followed in the 1965 elections. There is no evidence in the record to even suggest that this change "was a sudden adherence to previously ignored laws as a discriminatory device" so as to come within the "Freeze Doctrine" cases such as *Louisiana* v. *United States*, 380 U.S. 145 (1965). To the contrary, it would be difficult indeed to discriminate against a majority of the electorate by extending voting power rather than confining it. The effort was clearly made in good faith to correct a past mistake and not used as a discriminatory device. This conclusion is readily confirmed by common sense and the record does not suggest otherwise.

CONCLUSION

It is earnestly urged that the decision of the Three-Judge District Court is correct and that no substantial question on the merits has been raised or presented by the jurisdictional statement filed herein by Appellants. Therefore, the judgment of the District Court should be affirmed.

Respectfully submitted,

A. F. SUMMER
Attorney General of the State of Mississippi
WILLIAM A. ALLAIN
Assistant Attorney General of the State of Mississippi
P.O. Box 220
Jackson, Mississippi
R. L. GOZA
114 W. Center Street
Canton, Mississippi 39046
Attorneys for the Appellees

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 670

ERNEST PERKINS, ET AL., *Appellants,*

v.

L. S. MATTHEWS, Mayor of the City of Canton, ET AL., *Appellees.*

On Appeal from the United States District Court for the Southern District of Mississippi (Three-Judge Court)

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the three-judge district court, vacating the temporary restraining order and dismissing the complaint, is reported at 301 F.Supp. 565 and is reprinted at Appendix 31. The earlier opinion of Judge Nixon, granting the temporary restraining order, is not reported, but is reprinted at Appendix 13.

JURISDICTION

This is a suit to enforce the provisions of section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, against the use by the City of Canton (a subdivision

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of the State of Mississippi) of a voting practice or procedure different from that in effect on November 1, 1964.

The judgment from which the appeal is taken was entered by the United States District Court for the Southern District of Mississippi on July 24, 1969, and the Notice of Appeal was filed in that court on July 30, 1969.

The jurisdiction of the court below to hear the case was based on 28 U.S.C. §§ 1343(3), 1343(4), and 2201, and 42 U.S.C. § 1973c. *Allen* v. *State Board of Elections,* 393 U.S. 544 (1969). A direct appeal to this Court is authorized by 42 U.S.C. § 1973c, as well as by 28 U.S.C. § 1253, which provides for direct appeals from judgments in cases required by Act of Congress to be heard by three-judge district courts.

This Court noted probable jurisdiction on February 24, 1970.

STATUTE INVOLVED

The statute involved in this case is section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c:

> "Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) [1973b(a)] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person

shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court."

QUESTIONS PRESENTED

1. Whether a change in a city's municipal election procedure which (a) extends the boundaries to increase the percentage of white voters within the city limits, (b) provides for electing aldermen at large rather than by wards, and (c) moves the polling places, is a change dealing with a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," within the meaning of section 5 of the Voting Rights Act of 1965.

2. Whether the United States District Court for the Southern District of Mississippi had jurisdiction, in a section 5 case, to determine whether the voting laws were discriminatory in purpose or effect, or whether this authority is wholly committed to the United States

District Court for the District of Columbia or to the Attorney General of the United States.

3. Whether any relief short of ordering new elections held forthwith will adequately vindicate the important fourteenth and fifteenth amendment rights violated here?

STATEMENT OF THE CASE

The City of Canton is the county seat of Madison County, Mississippi, and has a population of slightly over 10,000, of whom about 60 percent are black and 40 percent are white. As a subdivision of the State of Mississippi, the City is subject to the Voting Rights Act of 1965, 42 U.S.C. § 1973. App. 90-91. Under section 5 of that Act, if it seeks to adopt "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," it must obtain a declaratory judgment that the new procedure "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." The City may also use the new procedure if it is submitted to the Attorney General of the United States and he fails to object within sixty days.

By the most recent count in the record, as of April 25, 1969, there were 3,042 black voters and 2,953 white voters registered in Canton, divided into four wards which have the following registration totals:

	White	Black	Total
Ward I	839	37	876
Ward II	992	174	1,166
Ward III	418	1,481	1,899
Ward IV	702	1,257	1,959
Unlisted Ward	2	93	95[1]

[1] App. 103.

For most of the 3,000 blacks, the 1969 elections (originally scheduled to begin on May 13, 1969) were the first city elections in which they would vote, since the last elections took place in 1965, just before the passage of the Voting Rights Act, at a time when there were no more than about 200 black voters. Transcript of May 9 hearing 61.

On November 1, 1964, and at the time of the 1965 elections, the boundaries of the City of Canton were as shown on the map introduced at trial, App. 95; the polling places were as shown in paragraph 13 of the Stipulation, App. 93; and four of the five aldermen were elected by individual wards. Since that time, the City has adopted the changes which form the subject of the instant lawsuit: (1) the boundaries have been extended three times, in 1965, 1966 and 1968, so that a substantial number of people and prospective voters (predominantly white) live in areas which are now for the first time within the City; (2) the polling places have been moved; and (3) the aldermen are now to be elected by the voters of the City at large. It is stipulated that the City of Canton has neither obtained the declaratory judgment required by section 5 of the Voting Rights Act nor submitted the new changes to the Attorney General. App. 90-94.

On May 1, 1969, the plaintiffs filed a suit attacking the annexations and the change in polling places, and seeking to prevent the City from holding elections in accordance with these changes.[2] On May 9, 1969, the plaintiffs' motion for a temporary restraining order

[2] When the original complaint was filed, plaintiffs were not aware that the earlier elections had been held by wards, so the change to at-large elections was added in an amendment on May 30, 1969. When the original complaint was filed, plaintiffs were also unaware of the 1965 annexation, so it, too, was omitted.

was heard by the Honorable Walter L. Nixon, Jr., United States District Judge, Southern District of Mississippi.

May Hearing. Evidence at the hearing included testimony that the annexations had brought in several hundred people (predominantly white), while adjacent areas with similar numbers of black people were not annexed. Transcript of May 9 hearing 23-29, 49-51. There was also testimony about the polling places, particularly those in the two heavily black wards, which indicated that the polling place for Ward 4 had been moved some distance from its former location in the City square, and was now located near the annexed white area, App. 43-44, and that the polling place in Ward 3 had been moved to the former City Jail. App. 44-45, 57-59. Evidence of black people's fear of the jail, based on previous history, was excluded. Transcript of May 9 hearing 40-42. The defendants sought to establish that the changes had been made in good faith and without any intent to discriminate, App. 49-56, but this was excluded (except for testimony that proprietors of the former polling places had refused permission to use these places again, App. 53) on the ground that neither Judge Nixon nor the three-judge court, when it heard the merits, had the "function or prerogative" of determining the motives of the City in making the changes:

> "The only questions to be decided by this three judge court in the final analysis, the three judge court to be designated, is whether or not the State of Mississippi or any of its political subdivisions have acted in such a way as to cause or constitute a voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting within the meaning of Section 5 of the

Voting Rights Act of 1965, which changed the situation as it existed as of November 1, 1964, and whether or not prior to doing so the City had filed a request for declaratory judgment with the United States District Court for the District of Columbia or asked the approval of the Attorney General of the United States as required by Section 1973." Transcript of May 9 hearing 127.

Judge Nixon went on to hold that the boundary extension was comparable to the shift from individual district elections to countywide elections for county supervisors, which was held by this Court in *Fairley* v. *Patterson* (*sub nom. Allen* v. *State Board of Elections*), 393 U.S. 544 (1969), to come within section 5 of the Voting Rights Act of 1965. Finding that the City had obtained neither the declaratory judgment nor the Attorney General's approval, Judge Nixon held that there was a sufficient probability that the full three-judge court would hold section 5 barred the boundary extensions to justify enjoining the elections; accordingly, he entered a temporary restraining order postponing the elections.[3]

On June 2, 1969, the case came on for hearing before the three-judge court (Coleman, Cir. J., and Cox and Nixon, Dist. JJ.), with the issues now including all three boundary extensions and the change from ward elections to at-large elections (added by amendment on May 30, 1969), as well as the removed polling places.

June Hearing. Additional evidence at the June hearing focused primarily on establishing more detailed population and registration figures for the City

[3] Judge Nixon did not deal directly with the question of the removed polling places in his opinion.

as a whole and for the annexed areas. This evidence showed that, on about January 12, 1969, shortly before the deadline for qualifying to vote in the 1969 elections, there were 2,794 black voters registered and 2,052 white voters. On April 25, 1969, shortly after the deadline for voting in 1969, there were 3,042 black voters and 2,953 white voters (broken down by wards according to the figures shown *supra.*) App. 103.

There was also evidence about the number of black and white persons who live in the areas brought into the City by the respective annexations:[4]

Annexation Year	Blacks	Whites
1965	46 (est.)	0
1966	28	187
1968	8	144[5]

The three-judge court, unlike Judge Nixon, allowed a defense witness to testify about the reasons for changing the polling places. App. 78-83. Finally, there was argument, but no testimony, that the change from ward elections to at-large elections was done to comply with the 1962 amendments to Mississippi Code § 3374-36, which had been in effect but not followed at the previous municipal elections in 1965.

On July 17, 1969, the three-judge court rendered its opinion, discussing each of the changes in turn, and

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[4] There was also testimony concerning the number of people residing in the annexed areas at the time they were brought in, which figures were later cited in the court's opinion.

[5] The figure of 46 blacks added by the 1965 annexation was a stipulated estimate. App. 66. The 1966 and 1968 figures are based on the actual physical examination by the City's witness, App. 100-01, and superseded earlier stipulated estimates.

holding that no injunction was warranted as to any of them. The court accordingly set aside the temporary restraining order and dismissed the complaint. In contrast to the approach of the single judge, the three-judge court examined the motives of the City in making each change, and concluded that since no improper motive had been shown, there was no violation of section 5:

(1) As to the expansion of boundaries, the court asked whether section 5 was intended to cover boundary extensions where black voters remained in the majority, and concluded in the negative:

> "Applying the full reach of the Act, Congress could not have intended such a result unless it were shown to be a strategem deliberately designed to overturn a black majority at the municipal polls."[6]

(2) As to the change from individual ward elections to at-large elections, the court held that the 1962 state statute requiring at-large elections could not have been passed to thwart the 1965 Voting Rights Act, and that the City was therefore justified in complying with it in 1969 (while noting that there was no evidence in the record showing why the City had not complied in 1965 nor why the City wished to change).

(3) Finally, as to the polling places, the court held that the changes had been necessary because two of the former polling places were too crowded and the other two were on private property whose owners had withdrawn their permission to use the space.

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[6] In determining the validity of the annexations, the court used the number of people living within the affected area at the respective times of their annexations, rather than the number of people living within those areas at the time of the election.

In thus holding that the plaintiffs' contentions were not well taken, the court did not at any point hold that any of the changes was not a "voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting."

Judgment was entered on July 24, 1969, dismissing the complaint and authorizing the City of Canton to proceed with its elections. This appeal followed.[7]

SUMMARY OF ARGUMENT

In *Allen* v. *State Board of Elections, supra,* this Court reversed three cases in which the United States District Court for the Southern District of Mississippi had so narrowly interpreted section 5 of the Voting Rights Act as to render the section virtually useless. Now, a scant year later, this Court is again faced with a holding of the same district court again emasculating section 5.

The changes in this case are threefold: (1) extending boundaries to increase the percentage of white

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[7] After the notice of appeal was filed, the City of Canton set new election dates beginning with the first primary to be held on October 7, 1969. On September 5, 1969, plaintiffs moved to stay that portion of the order authorizing the elections to proceed and to enjoin the elections pending the appeal to this Court. This motion was denied, Coleman, J., by an order filed September 23, 1969, which expressly reserved the appellants' right, in the event of a reversal on appeal by this Court, to apply in the district court for an order setting the election aside.

On September 25, 1969, appellants filed a motion for a stay and injunction pending appeal with the Circuit Justice, which was denied on October 1, 1969.

The elections went forward, and none of the appellants was elected, although some won majorities in their wards and would therefore have been elected if the City had not changed from ward elections to at-large elections.

electors; (2) moving the polling places; and (3) shifting from individual ward elections to at-large elections for alderman. The district court did not hold that any of these was not a change in "voting qualification or prerequisite to voting, or standard practice, or procedure with respect to voting." It could hardly have done so, especially after a single judge had already enjoined the election because the boundary extension had not been cleared under section 5. Rather, the district court went into the motives for the changes and pronounced each one valid.

Yet the law is clear that that determination is not within the power of a local district court, but is committed entirely to the United States District Court for the District of Columbia and to the Attorney General of the United States. By holding, as it did, that these voting changes were valid unless the appellants could show they were discriminatory, the district court stood section 5 on its head, and simply proved that Congress acted wisely when it took that question out of the local district courts' hands.

This Court must therefore reverse the judgment below and make it clear that when Congress put the burden on states covered by the Voting Rights Act to prove their voting law changes were non-discriminatory, it meant what it said.

Moreover, this Court should set aside the elections which have been held in violation of section 5, and order new elections held under the voting practices and procedures in effect on November 1, 1964. There is no justification, as there may have been in *Allen* v. *State Board of Elections, supra,* for any lesser form of relief. The violations were crystal-clear and be-

spoke nothing more nor less than an intent to ignore the law. Unless the elections are set aside, there will never be any reason to obey section 5, and that law, for which Congress held such high hopes, will become a museum piece.

ARGUMENT

1. The Merits

This Court can rarely have seen a case in which an Act of Congress was as cavalierly ignored by a district court as this one. Appellants sought an order from the district court in Mississippi requiring the city of Canton to obey section 5 of the Voting Rights Act of 1965. They got that order from the single district judge, in the form of a temporary restraining order stopping the elections because of the City's failure to obtain clearance from the Attorney General or from the district court in Washington, D. C. When the three-judge court convened, however, it not only arrogated the function of judging the validity of the new voting practices and procedures, but completely reversed the Act by placing the burden of proof on the appellants: "Applying the full reach of the Act, Congress could not have intended such a result *unless it were shown to be a stratagem* deliberately designed to overturn a black majority at the municipal polls." App. 34 (emphasis added).

The merest glance at the language or history of section 5, of course, will show that Congress not only could have intended such a result but did, and said so in the plainest way possible.

Those states, including Mississippi, which have traditionally deprived blacks of the right to vote have displayed great ingenuity in raising new barriers of

discrimination to circumvent successive checks imposed by Congress and the courts. In passing the Voting Rights Act of 1965, Congress therefore barred these states and their subdivisions both from using "any test or device" as a prerequisite to voting and from making any changes in their voting and election procedures without first satisfying federal authorities that the changes would not have the purpose or effect of discriminating against black people.

Only last Term, this Court exhaustively examined section 5 in *Allen* v. *State Board of Elections, supra,* which involved three cases from Mississippi and another from Virginia. The Court examined the background, legislative history and structure of the Act, and concluded that section 5 covered each of the cases before the Court:

> "We must reject a narrow construction that appellees would give to § 5. The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race. Moreover, compatible with the decisions of this Court, the Act gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.' 79 Stat. 445, 42 U.S.C. § 1973*l*(c)(1). . . .
>
> "The legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way." 393 U.S. 544, at 565-66 (footnote omitted).

The Voting Rights Act was an attempt to enforce the guarantees of the fifteenth amendment fully, after earlier measures had failed. The coverage is thus as broad as that of the fifteenth amendment itself. This

Court's fifteenth amendment cases make it clear that "[t]he Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." *Lane* v. *Wilson,* 307 U.S. 268, 275 (1939). And, as this Court held in *Reynolds* v. *Sims,* 377 U.S. 533, 555 (1964), "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

The two most significant changes involved in this appeal are familiar from earlier cases dealing with voting rights. The change from individual ward elections to at-large elections was explicitly held to be covered by section 5 in one of the cases decided with *Allen: Fairley* v. *Patterson, supra.* The expansion of the boundaries is an equivalent dilution of the votes of City residents, including blacks, of the sort held to violate the fifteenth amendment's voting guarantees in *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960). Finally, the change in polling places clearly has a direct effect upon voting, of a sort that might well have a discriminatory purpose or effect.[8]

The appellees do not appear to claim that the new provisions were not changes in voting practices or pro-

[8] Both the boundary extension and the change in polling places were described by high Justice Department officials as examples of changes coming within section 5. Hearings Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, on Amendments to the Voting Rights Act of 1965, held in July 1969 and February 1970, at pp. 248, 506 [hereinafter Senate Hearings].

cedures. Rather, the burden of appellees' argument seems to be that since various cities often extend their boundaries or shift polling places in good faith and without racial motive or effect, the same should be assumed here, without question. The short answer to that theory is that Congress decided otherwise. There is more than one way to skin a cat, or extend a boundary, and section 5 puts it up to the city or state to prove that it has done it properly. And what the city does to solidify the change, such as extending municipal services to the newly-annexed areas, can in no way cure the city's failure to obey section 5.

Nor did the district court hold that these were not changes in voting practices or procedures. Rather, the court examined the motives and effects of the three changes and held that they were all nondiscriminatory changes made in good faith. Yet, it is abundantly clear under the statute that this inquiry is beyond the functions and prerogatives of the local district court, and is committed solely to the jurisdiction of the United States District Court for the District of Columbia or of the Attorney General of the United States.

This limited function was recognized by the single judge when he granted the temporary restraining order. Referring to the changes he said:

> "... I don't think they were done for the reason that the Plaintiffs or Petitioners herein allege they were done for, but at the same time that question or that matter of determination by me has been completely taken away by the laws enacted by the Congress and by the decision of the United States Supreme Court in Allen versus State Board of Elections. I am not to determine that. All I can determine under the law is whether or not there

has been such a change in standard, practice, or procedure of voting qualifications or prerequisites than those that existed on November 1st, 1964, and after that—without approval, which has been stipulated that that has not been requested and without that we can't go any further in this case." App. 52-53.

"I am powerless to decide this case on the question of motive. That is a matter that the Congress and the United States Supreme Court has said is left up to the Attorney General of the United States and the District Court for the District of Columbia. It completely deprives the United States District Courts of the districts in which these matters come up and arise from making a determination in the matter." App. 55-56.

"... the three judge court in my opinion has no more power than I do at this particular time to determine whether or not this was done in good faith or what the effect will be. Once it is not [*sic*] determined that there has been a change in voting qualifications, standards, practice or procedure, that is as far as that court can go. If the three judge court finds that there is, or has been a change in the voting qualifications or standard or practice or procedure with respect to voting by the annexation of these new areas by the City of Canton, a political subdivision of the State, then the three judge court is duty bound in that event to issue an injunction and enjoin the holding of this election by participation of the voters in the newly annexed area." (Transcript of May 9 hearing 96.

The single judge also correctly held that in presenting its case to the Attorney General or to the District of Columbia court, the City of Canton would bear

the burden of showing a nondiscriminatory purpose and effect:

> ". . . At that time the City of Canton then has the burden of going to the Attorney General of the United States and seeking his approval to hold that election by allowing the voters in the newly annexed areas to participate in the election of the City of Canton, or by filing an action in the District Court of the United States for the District of Columbia to obtain a declaratory judgment that this annexation was not had for the purposes prohibited by the Voting Rights Act of 1965.
>
> "That's the time the City would be required and should put on its proof with respect to why this was done and what was intended and whether or not it was normal business of the City and whether or not it was designed to deprive any citizen of his rights under the Fourteenth and Fifteenth Amendments of the United States Constitution." Transcript of May 9 hearing 96.

The three-judge court, however, went into the purpose and effect of the City's changes, and assumed the function, as Judge Coleman observed, of deciding their validity. App. 73-74. But this is precisely the question which section 5 says must be decided in the District of Columbia. Thus the lower court here had no power under section 5 to decide whether the annexations were made in good faith, nor whether annexing white areas while leaving out surrounding black areas showed a discriminatory purpose or effect; and, of course, the lower court had no power to decide, as it did, that decreasing a black majority without wholly erasing it is not discriminatory.

Similarly, the lower court had no power to decide that the City's decision to obey the 1962 statute which

it had previously ignored was nondiscriminatory.[9] Finally, the lower court had no power to decide that the reasons advanced for moving the polling places were acceptable.[10]

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[9] Sudden adherence to previously ignored laws is a familiar discriminatory device that has been enjoined in many "freeze doctrine" cases, *see* Louisiana v. United States, 380 U.S. 145 (1965), including at least one brought under section 5. Vanover v. Maloney, Misc. No. 581 (4th Cir. July 16, 1969) (Opinion of Butzner, J., denying a stay pending appeal), in which the court enjoined the enforcement of the party loyalty oaths of Virginia Code §§ 24-253, 24-367 and 24-368, in Dickenson County, Virginia, on the ground that they had never been enforced there before November 1, 1964, and therefore must be approved under section 5.

[10] The polling places in the two heavily black wards were moved to the old, dilapidated jail (Ward III) and to a location close to the newly annexed, predominantly white area (Ward IV). *Compare* the remarks of Representative McCulloch (one of the floor leaders of the Voting Rights Act) during the 1969 hearings on extending the Act:

> "Mr. Chairman, I should like to make the comment that in due course it is my intention to introduce legislation that will meet this problem in some of the Northern states. You know, most of us never took the position that we are without sin. The movement of voting places on short notice in certain sections of the North has been notorious of late." Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, on H.R. 4249 and Similar Measures, held on June 19, 1969, at p. 133.
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> "We hope to prevent that by general election-reform legislation, which I intend to offer very shortly. I have received some indication that in some cities in the North this last-minute change of polling places might have been intended to deprive some of their right to vote on account of race, but often the deprivation is on account of political affiliation." Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary, on H.R. 4249 and Similar Measures, held on June 19, 1969, at p. 135.

2. Relief

The central question in this case is not the merits, which can hardly be in doubt, but the nature of effective relief. In *Allen* v. *State Board of Elections, supra,* the novelty of the statute and the uncertainty of its meaning led this Court to give only prospective relief. There is no basis for such a holding in this case. The proper relief, and the only relief that will carry out the legislative purpose underlying section 5, is to order immediate new elections, to be held under the practices and procedures in effect before the adoption of the changes involved in this case. The appropriateness of such relief was implicitly recognized by the district court when the order denying a stay pending appeal included express leave to apply for new elections in the event that court's judgment be reversed.

In *Allen, supra,* the Justice Department, asked for its views on the question of relief, believed it appropriate to allow the state a brief time to submit the pending changes for clearance under section 5, *nunc pro tunc,* with the elections to stand if the statutes were approved. This suggestion was guardedly made "on balance—taking into account the fact that the new provisions in suit are not so clearly within the scope of section 5 that the failure to submit them for clearance amounts to deliberate defiance." Supplemental Memorandum for the United States as Amicus Curiae, p. 3 (October 1968). Appellants believe that suggested course was wrong in *Allen,* and would be doubly so here, where any claim of good faith misinterpretation of section 5 would be wholly untenable.

No close analysis is required to show why limiting the relief as suggested by the Justice Department in

Allen would emasculate section 5. If the City of Canton may remedy its clear-cut violation of section 5 by a belated submission, there would never be any reason for any state or subdivision to obey section 5: a holding of section 5 coverage would require nothing more than the submission that should have been made at the start.

This interpretation was suggested in recent hearings by Deputy Assistant Attorney General Norman, who recognized that it made section 5 a dead letter:

> "Now, it has been said, I think, by some that section 5 had advantages because the Attorney General could bring lawsuits in order to enjoin the operation of a voting change and he wouldn't have to prove anything except that the law was not submitted to him. He would just simply file a paper in the Court saying that Alabama has changed one of the laws to affect voting and they haven't submitted it to him and, therefore, he would ask for an order of the Court requiring the State to do so, or enjoining the State from using this voting change until it has been approved by the Attorney General or by the District Court for the District of Columbia.
>
> "I think that idea overlooks a very important practical fact. There are, in my judgment, no such lawsuits and cannot be such a lawsuit because when the Attorney General goes into Court and says to the Court, 'I have a defendant here, the State of Alabama, or another State, and I am complaining because they didn't submit a change to me, which I know about or I couldn't have brought the suit,' and any judge that I know of would say, 'That is right, Mr. Attorney General, now that you are here tell us whether you object or don't object to this change, because if you do object to it, we will litigate; but if you don't object to it, then you are out of court anyway.'

"In my judgment as a practical matter, there could be no such thing as that type of lawsuit by the Attorney General under section 5.

"I think the private citizen is no better off, really, because while there have been some suits under section 5 by private citizens, as a practical matter his relief would be to require the election officials or the defendant to submit the change to the Attorney General for his approval.

"I do not have any decision by the courts setting aside an election because a voting change was not submitted to the Attorney General. I would be very surprised if any court ever would do that.

"So, that in a private citizen's suit under section 5 his proof would be easy, it would be an easy lawsuit, but his remedy is very little. He hasn't much of a remedy." Senate Hearings 506.

With all due respect to Mr. Norman's familiarity with the Act, appellants submit that his reading of section 5 is a palpable repudiation of what Congress itself regarded as a major achievement in guaranteeing the civil rights of black voters. His reading proceeds from the same assumption undoubtedly shared by the appellees in this case: that section 5 is merely a formal procedure for informing the Justice Department of the existence of state laws and practices that may violate the constitution and that violation of section 5 means nothing unless there is also a constitutional violation. This limited view of section 5 wholly ignores the frustration that Congress felt in 1965 over its inability to secure compliance with the fifteenth amendment and its desire to take strong action to force obedience. It is hardly likely that a Congress recalling the inadequacies of its voting rights laws of 1957, 1960 and 1964,

could have intended to pass a law as meaningless as the one Mr. Norman described.

A construction under which section 5 provides strong rights and remedies even in the absence of clear constitutional violations, on the other hand, is precisely in accordance with the legislative mandate of the Voting Rights Act of 1965. Such a result is consistent both with the Supremacy Clause of the Constitution of the United States and with the final sections of the fourteenth and fifteenth amendments, which give Congress the power to pass appropriate legislation enforcing those amendments.

The short of it is that allowing the City of Canton to cure its violations now would render section 5 a harmless clause which creates no incentive to obey the fifteenth amendment and which adds nothing to the self-enforcing capabilities of the fifteenth amendment. New elections must therefore be ordered if section 5 is to play the role plainly intended by Congress, that of "appropriate legislation," U.S. Const., XV amend., § 2, adopted to enforce the fifteenth amendment.

CONCLUSION

This case is critical in achieving the Congressional purpose underlying the Voting Rights Act. Until this Court decided the Virginia case and the three Mississippi cases involved in *Allen* v. *State Board of Elections, supra,* no court had ever enforced section 5. In *Allen,* this Court made its ruling prospective; thus relief was impossible, even though the Attorney General of the United States has since found that each of the three Mississippi statutes involved in *Allen* is discrim-

inatory. Letter, Jerris Leonard to A. F. Summer, May 21, 1969.[11]

The changes in the instant case, as Judge Nixon recognized, are crystal clear changes in voting practices or procedures, and no court or judge has held at any time they are not. Relief, however, has been denied. Unless this Court reverses the judgment in this case, requires the enforcement of the clear mandate of section 5, and orders new elections forthwith, Mr. Justice Harlan's prophecy in *Allen* will come to pass, and the Voting Rights Act will never play the full role Congress intended for it.

For the reasons stated above, this Court should reverse the judgment below, set aside the elections held in October 1969, and order new elections held forthwith in which the changes in voting procedure involved in this case may not be enforced.

Respectfully submitted,

ARMAND DERFNER
603 North Farish Street
Jackson, Mississippi
Attorney for Appellants

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[11] The burden on the states is not heavy where *legitimate* statutes are involved. As of January 29, 1970, only 22 of the 436 statutes submitted to the Attorney General had been disapproved. Senate Hearings 505.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 670

ERNEST PERKINS, et al.,
Appellants,

vs.

L. S. MATTHEWS, Mayor of the City of Canton, et al.,
Appellees.

ON APPEAL FROM A DISTRICT COURT OF THREE JUDGES,
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR APPELLEES

STATEMENT OF CASE

The City of Canton, Mississippi is a code charter municipality under the Laws of the State of Mississippi, and operates under an aldermanic form of government, consisting of a mayor, an alderman at large and one alderman from each of the four wards into which the city is

divided, as shown on the map introduced in evidence at the trial. (See App. 95). The ward lines were established prior to November 1, 1964. (See paragraph 12 of the Stipulation, App. 93).

The population of the city according to the 1960 census was 9,707. The present estimated population is 12,000. At the time of the filing of the suit there were 5,995 qualified electors in the city of which 3,042 were black and 2,953 were white.

Since the enactment of the Voting Rights Act of 1965, the city has expanded its boundaries on three occasions, in 1965, 1966 and 1968. These expansions were made pursuant to a long range plan formulated by the governing authorities in late 1962 or early 1963, which provided for the future growth and development of the city, giving priority to the annexation of an area to the south (1965), then to the east (1966) and last to the north (1968). (See paragraph 5 of the Stipulation, App. 91). Because of the magnitude of the project and the expenditures involved, the annexations could not be made at one time but only over a period of years, and only after the expenditure of approximately $400,000.00 to extend and improve the city's sanitary sewerage collection and disposal system. The necessary sewerage improvements were completed in early 1964. (Paragraph 6 of the Stipulation, App. 92). In 1965 the city annexed the area to the south, in 1966 the area to the east and in 1968, the area to the north, as shown on the map introduced in evidence at the trial, App. 95, and as stated in paragraph 7 of the Stipulation, App. 92. Each of such annexations were done in accordance with the Laws of the State of Mississippi, including the ratification and approval thereof by the Chancery Court of Madison County, Mississippi, as stated in paragraph 8 of the Stipulation, App. 92. The municipality has expended

approximately $750,000.00 for utilities and sewerage improvements and extensions in these areas, as shown by paragraph 9 of the Stipulation, App. 92, 93. The parties stipulated and the lower Court found that the racial composition of the adult population of the annexed areas at the time of annexation was:

Annexation	Population	Black	White
1965[1]	46	46	0
1966[2]	92	28	64
1968[3]	120	8	112

Under Mississippi law, the City of Canton was required to hold its quadrennial elections in 1969 as follows: first primary, May 13; second primary, May 20, and general election, June 3. Prior to the elections the governing authorities are required to designate polling places.

In April of 1969, the Mayor and Board of Aldermen, as required by law, adopted a resolution designating the polling places to be used in the 1969 municipal primary and general elections. This resolution was published in the Madison County Herald, a newspaper published and of general circulation in the City of Canton, Mississippi, as required by law. In addition, the location of the polling places was widely advertised as a news item in the paper for several weeks. The polling places so designated were different from the ones used at the 1965 elections, which were the last municipal elections held after November 1, 1964, and prior to the filing of the complaint.

The laws of Mississippi governing municipal elections provide for the election of aldermen by wards, but by the election of them by a majority vote of the entire electorate

1. App. 66.
2. App. 77.
3. App. 66.

of the municipality. This statute is *Miss. Code Ann.* (1942-Recompiled) Section 3374-36.

Prior to the passage of the Voting Rights Act of 1965, the city elected to be divided into four wards. The ward lines have not been changed since November 1, 1964. (Paragraph 12 of the Stipulation, App. 92).

The municipal elections held in May and June of 1965 were not held in accordance with this statute in that instead of electing one alderman at large and four aldermen, one from each ward but by a majority vote of the entire electorate of the municipality, one alderman at large was elected and four aldermen were elected, one from each ward but by a majority vote of the electorate of the particular ward involved, as provided under the statute as it existed prior to the 1962 amendment. Thus, the city unintentionally followed the old law instead of the 1962 statute. Despite this error, it is specifically pointed out to the Court that the mayor and the alderman at large have always been elected by a majority vote of the entire electorate of the municipality.

On May 1, 1969, twelve days prior to the first primary election, the Appellants filed a complaint in the United States District Court for the Southern District of Mississippi, seeking to enjoin the 1969 primary and general elections on the grounds that the 1966 and 1968 annexations and the change of polling places were within Section 5 of the Voting Rights Act of 1965 and had not been approved either by the United States Attorney General or by a declaratory judgment of the United States District Court for the District of Columbia. The Appellants requested that the matter be heard by a Court of three judges and prayed for a temporary restraining order until the Court could be empaneled and convened.

On May 9, 1969, Honorable Walter L. Nixon, United States District Judge for the Southern District of Mississippi, issued an order temporarily restraining the elections until the complaint could be heard on its merits before a Three-Judge Court.

On May 30, 1969, the complaint was amended to include the method of electing the four aldermen as prescribed by *Miss. Code Ann.* (1942-Recompiled) Section 3374-36, as amended in 1962, on the ground that it had not been followed in past elections. (App. 27-30).

The Appellees included the 1965 annexation as an issue by way of their answer to the complaint. (Paragraph 8, App. 22). The original and amended complaint neglected to challenge this annexation, which was the first under the city's long range boundary extension program and which included only black residents.

On June 2, 1969, the case was heard on its merits before a Three-Judge Court composed of Honorable J. P. Coleman, Circuit Judge and Honorable W. H. Cox and Honorable Walter L. Nixon, Jr., District Judges, on the Section 5 issue. The Appellants introduced no evidence to support the allegations in the complaint pertaining to discriminatory purposes or practices in violation of the Fifteenth Amendment. On July 17, 1969, the Court rendered its opinion and on July 24, 1969, entered its judgment, dismissing the complaint, and finding that the issues raised by the complaint, as amended, did not come within Section 5 of the Voting Rights Act of 1965. (App. 31-37, 38).

Subsequent thereto, the governing authorities of the city reset the elections as follows: first primary, October 7, 1969, second primary, October 14, 1969, and general election, October 28, 1969.

The Appellants then moved the District Court for a stay of the elections pending appeal, which was denied by order entered September 12, 1969. (App. 41, 42). The Appellants next applied to this Court for a stay and injunction pending appeal, which was denied on October 1, 1969, by Mr. Justice Black.

Accordingly, the municipal primary and general elections were held on the above stated dates, and officers were elected. They have been properly qualified and commissioned to hold the offices to which elected and have served in such capacities since November 1, 1969.

SUMMARY OF ARGUMENT

This appeal presents the following propositions to the Court for decision:

I. Whether (a) the extension of municipal boundaries, (b) the election of municipal officers in accordance with the one person, one vote doctrine, and (c) the redesignation of polling places for good cause and with proper notice given, fall within the purview of Section 5 of the Voting Rights Act of 1965.

II. Whether, assuming the Appellees are in error in their contention that the above stated matters do not come within Section 5, should this Court require new elections to be held.

Proposition I (a). In regard to the extension of the municipal boundaries, the Appellees contend that this is a normal and necessary function of growing municipalities, and could not have been envisioned by Congress as being within Section 5, without granting unto the Attorney General and the United States Court of the District of Columbia the absolute power, exercised arbitrarily or otherwise, to control the rate and direction of municipal growth and development.

Proposition I (b). The Appellants further contend that Section 5 was never intended to result in requiring a municipality to clearly violate this Court's decisions requiring the vote of all electors to count equally, or one person, one vote, in the election of municipal governing authorities. Accordingly, the election of the four aldermen by a majority vote of the entire electorate of the municipality is not a Section 5 question, particularly under the facts of this case.

Proposition I (c). The Appellees next contend that surely Congress could not have intended to hold elections in abeyance simply because the last used polling places are found to be unavailable, and new ones must be selected. Thus, Section 5 does not apply to redesignation of polling places for a proper purpose.

Proposition II. The Appellees contend that even if the Court should decide that all of the above contentions are in error, the elections held in October, 1969, should not be voided. To do so would unjustly penalize a municipality and its taxpayers, which has admittedly acted in good faith, by causing additional expensive and most importantly causing an unwarranted disruption of the orderly conduct of municipal government.

ARGUMENT

I.(a)

Do Municipal Annexations Violate Section 5.

The constitutionality of the Voting Rights Act of 1965 has been clearly and definitely established by this Court. *South Carolina* v. *Katzenback*, 383 US 301 (1966), and, of course, the Appellees raise no question in that regard.

However, it defies the imagination to attempt to conjure up a set of facts such as those involved in this case

which more cogently reveal the pitfalls of Section 5 of the Voting Rights Act of 1965 as pointed out by Mr. Justice Black in his dissent in *Katzenback*, supra:

> "Section 5, by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless."
>
> "I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in faraway places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces."
>
> "A federal law which assumes the power to compel the States to submit in advance any proposed legislation they have for approval by federal agents approaches dangerously near to wiping the States out as useful and effective units in the government of our country. I cannot agree to any constitutional interpretation that leads inevitably to such a result."
>
> "I cannot agree with the Court that Congress—denied a power in itself to veto a state law—can delegate this same power to the Attorney General or the District Court for the District of Columbia. For the effect on the States is the same in both cases—they cannot pass their laws without sending their agents to the City of Washington to plead to federal officials for their advance approval."

Certainly if a discriminatory design or purpose was shown to exist, the rule of *Gomillion* v. *Lightfoot*, 364 US 399 (1960) and the many other decisions of this Court dealing with purely Fifteenth Amendment matters would apply. But this is not the case here. There is no evidence

that even remotely infers that the three expansions of municipal boundaries had or now have any discriminatory design or purpose. The stipulation between the parties clearly establishes otherwise. (Paragraphs 5, 6, 7, 8, 9, App. 91, 92, 93).

The Appellants represent to the Court that these expansions are manifestations of a sinister plot to discriminate against the black citizens of Canton. The evidence does not support them. Therefore, they say, that a mere possibility exists that these expansions may remotely affect somebody's vote at some time.

However, the underlying and basic fact is that all municipal corporations, regardless of size, are faced with this immutable principle: It must either grow, develop and expand or it must remain static, stagnate and die.

The City of Canton for the benefit and welfare of all citizens chose the former.

Appellees contend and respectfully submit that Congress, by the enactment of Section 5, did not intend to penalize progress and development of municipalities. Neither did it intend to make the Attorney General or the District Court of the District of Columbia, the final arbiter over the rate, extent and direction of municipal growth and expansion.

Also, Appellees respectfully submit, that the annexations are established by the evidence to have been required by the normal and orderly growth of a relatively small but progressive municipality, and not a sham to discriminate against the Appellants. Indeed, the city's expenditure of a sum in excess of $750,000.00, and the cost of other municipal services in the annexed areas, confirms this.

Appellees point out that an annexation in and of itself has no effect whatsoever upon the number of qualified

electors in the municipality or racial composition of the electorate. The inhabitants of an annexed area must still fulfill the residency requirements in order to register to vote, and even then may never choose to do so. If they do choose to register, it is a personal decision and act, not an act of any political subdivision. Therefore, the annexations cannot be seriously said to constitute "a voting qualification or prerequisite to voting or standard, practice or procedure with respect to voting".

To hold that these undisputedly non-discriminatory annexations come within Section 5 and are therefore void, would unleash numerous and insurmountable problems. Among them are the status of sales and ad valorem taxes collected over the years, in the annexed area, the jurisdiction of the police and fire departments, the effect on reduced fire insurance rates in the area, the status of municipal bonds issued for improvements in these areas, the status of zoning, building, housing and plumbing codes.

Thus, it is submitted that the District Court was correct in deciding that the annexations are not within the scope of Section 5. To do otherwise, would inevitably lead to the absurd conclusion which must surely follow: That every act of the municipality which may directly or indirectly result in population growth, i.e. industrialization, renewal, must first be approved by the Federal Government.

I.(b)

Did the Election of Four Aldermen by a Majority Vote of the Entire Electorate of the Municipality Violate Section Five.

Miss. Code Ann. (1942-Recompiled) Section 3374-36, approved May 24, 1962, provides for the number and method of election of the Board of Aldermen in cities with

a population of less than 10,000 population according to the last available census which was the 1960 census at the time of the elections in question. Canton falls within this category. The code section is as follows:

> § 3374-36. Number of aldermen and wards—selection of aldermen. *In all municipalities having a population of less than ten thousand (10,000) according to the latest available Federal Census, there shall be five (5) aldermen, which aldermen may be elected from the municipality at large, or in the discretion of the municipal authority, the municipality may be divided into four (4) wards, with one alderman to be selected from each ward and one from the municipality at large.* (Emphasis supplied). On a petition of twenty per cent (20%) of the qualified electors of any such municipality, the provisions of this Act as to whether or not the aldermen shall be elected from wards or from the city at large shall be determined by the vote of the majority of such qualified electors of such municipality voting in a special election called for that purpose. *All aldermen shall be selected by vote of the entire electorate of the municipality.* (Emphasis supplied). *Those municipalities which determine to select one alderman from each of the four (4) wards shall select one from the candidates for alderman from each particular ward who shall be a resident of said ward by majority vote of the entire electorate of the municipality.* (Emphasis supplied).

The Appellees admit that this statute was not followed in the 1965 elections, but was followed in the 1969 elections. In both elections the mayor and alderman at large were elected by a majority vote of the entire municipal electorate. However, in the 1965 election the other four aldermen were elected one from each ward by a ma-

jority vote of the ward's electorate rather than at large. This was not done intentionally or by design, but through sheer mistake or ignorance of the law. That it was done is a fact, but just as factual is that the record in this case does not suggest to say nothing of infer that this "was a sudden adherence to previously ignored laws as a discriminatory device" so as to come within the rule of the "freeze doctrine" cases such as *Louisiana* v. *United States*, 380 US 145 (1965).

The fact is that this was a bona fide effort by the City to not only comply with the Laws of Mississippi, but also to comply with the teachings of this Court as stated in *Baker* v. *Carr*, 369 US 186, and *Reynolds* v. *Sims*, 377 US 533, and the recent case of *Hadley* v. *Junior College District*, ... US ..... (February 25, 1970) in which the Court speaking through Mr. Justice Black said in part:

> "We therefore held today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis which will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials."
>
> "In holding that the guarantee of equal voting strength for each voter applies in all elections of governmental officials, we do not feel that the States will be inhibited in finding ways to insure that legitimate political goals of representation are achieved. We have previously upheld against constitutional challenge an election scheme which required that candidates be residents of certain districts which did not contain equal numbers of people, *Dusch* v. *Davis*, 387 US 112

(1967). Since all the officials in that case were elected at large, the right of each voter was given equal treatment."

It should be pointed out that a majority of the voters were black. Thus, the city's action in effect extended the black majority to all four wards rather than confining it to two wards as it would have been under the method followed in the 1965 elections. It would be difficult indeed to discriminate against a majority of the electorate by extending voting power rather than confining it.

The effort was clearly made in good faith to correct a past mistake and not used as a discriminatory device. This contention is readily confirmed by common sense and the record does not suggest otherwise.

The Appellees submit that it is inconceivable that Congress could have intended Section 5 as a vehicle to thwart the "one person-one vote" rule repeatedly laid down by this Court, there being no discriminatory purpose or design shown to exist.

I.(c)

Does the Redesignation of Polling Places Come Within Section 5.

It is practically impossible to hold an election of any kind without a polling place. It is usually desirable that polling places be inside buildings with adequate shelter, space, accommodations, and parking areas, to encourage voter participation. It is also well known that when the owners of private property, used in the past for polling places, refuse future access for that purpose new polling places must be selected.

It is readily admitted that the polling places used in the 1969 elections were not the ones used in the 1965 elections. (Paragraph 13 of the Stipulation, App. 93). How-

ever, Appellees submit that the polling places were redesignated for a good and proper purpose and that their location was amply publicized well in advance of the elections.

In considering this point, the Court should note that at the time of the 1965 elections, the city had approximately 2,500 qualified electors. In 1969 it had almost 6,000.

The polling places were changed for reasons of necescity and for the convenience of the voters. The city is now and was on November 1, 1964, divided into four wards. (Paragraph 12 of the Stipulation, App. 93). The ward lines have not been changed since 1963, and are shown on the map at App. 95. Under Mississippi Law, there must be a polling place within each of the four wards. The polling places for Wards II and III at the 1965 elections were located in bank lobbies. The owners would not permit their use at the 1969 elections because of security reasons and the disruptive effect on business. (App. 80). These polls had to be moved, so new polling places were designated. The polling places for Wards I and II used in the 1965 elections did not have adequate parking facilities or space to accommodate the increased number of voters or voting machines, which were to be used for the first time, replacing paper ballots previously used. (App. 79). Therefore, these two were moved to insure an orderly and efficient election for the convenience of the electors. Thus, the change in polling places was a matter of necessity, and not of choice. There was nothing else the election officials could do and faithfully discharge their duties to the electorate of insuring conveniently accessible, spacious, and efficient facilities so that all who choose to vote might vote without undue delay.

For as Mr. Justice Douglas once said:

> "Common sense often makes good law". *Peak* v. *United States*, 353 US 43, 46.

Clearly, a matter such as this, when the only alternative was to hold the election in indefinite abeyance, was not intended by Congress to be covered by Section 5, and the District Court did not err in so holding.

II.

The Municipal Elections Held in November, 1969, Should Not Be Set Aside Even Though the Court May Find That the Acts Come Within Section Five.

After judgment of the District Court, the Appellants applied to the Court for a stay of the elections pending appeal. This motion was denied. The Appellants next applied to Mr. Justice Black for a stay of the elections. This also was denied.

Thereafter, acting in good faith and in the belief that the law so required, the city proceeded to hold its primary and general elections. The officers elected have been duly certified and commissioned and have conducted the governmental affairs of the city since November 1, 1969.

In addition the questions here presented are even more novel and complex than the issues in *Fairley* v. *Patterson*, 393 US 544 (1969), in which the Court refused to order new elections and stated:

> "The Solicitor General has also urged us to order new elections, if the State does not promptly institute § 5 approval proceedings. We decline to take corrective action of such consequence, however. These § 5 coverage questions involve complex issues of first impression—issues subject to rational disagreement. The state enactments were not so clearly subject to § 5 that the Appellee's failure to submit them for approval constituted deliberate defiance of the Act. Moreover, the discriminatory purpose or effect of these statutes, if any, has not been determined by any Court."

To order new elections, even if the Appellees are in error in the contentions herein presented, would seriously impair the orderly and efficient conduct of the municipal government. This is in accordance with the teachings of this Court in *Sims* v. *Reynolds*, supra, *Roman* v. *Sincock*, 377 US 695 and *Davis* v. *Mann*, 377 US 678.

CONCLUSION

Appellees therefore respectfully submit that the appeal must be dismissed for lack of jurisdiction or affirm the decision of the District Court of Three Judges for the Southern District of Mississippi.

Respectfully submitted,

A. F. SUMMER
Attorney General of the State of Mississippi

WILLIAM A. ALLAIN
Assistant Attorney General of the State of Mississippi
P.O. Box 220
Jackson, Mississippi

R. L. GOZA
114 W. Center Street
Canton, Mississippi 39046
Attorneys for Appellees

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

PERKINS ET AL. *v.* MATTHEWS, MAYOR OF THE CITY OF CANTON, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 46. Argued October 20, 1970—Decided January 14, 1971

Appellants, voters and candidates for city offices, sought to enjoin the 1969 election in Canton, Mississippi, alleging that the 1969 requirements differed from those in effect on November 1, 1964, and at the last city election in 1965, and that the city sought to enforce the changed requirements without following the approval procedure set forth in § 5 of the Voting Rights Act of 1965. Section 5 precludes a State or political subdivision covered by the Act from administering "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," without first submitting the change to the U. S. Attorney General or securing a declaratory judgment from the District Court for the District of Columbia that the change does not have a racially discriminatory purpose or effect. Canton, which is covered by the Act, sought to enforce changes (1) in location of polling places, (2) in municipal boundaries through annexations of adjacent areas, thus increasing the number of eligible voters, and (3) from ward to at-large election of aldermen. Though at-large election of aldermen was called for by a 1962 Mississippi statute, the 1965 Canton election was by wards. A single District Judge, relying on *Allen* v. *Board of Elections*, 393 U. S. 544, temporarily restrained the election, but a three-judge court, after examining the challenged changes to determine whether they had "a discriminatory purpose or effect," dissolved the injunction and dismissed the complaint. *Held:*

1. The three-judge court should have considered only the issue of "whether a particular state enactment is subject to the provisions of the Voting Rights Act, and therefore must be submitted

Syllabus

for approval before enforcement." *Allen* v. *Board of Elections*, *supra*, at 559. Pp. 4–7.

2. Each of the challenged changes falls within § 5 as a "standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," and requires prior submission. Pp. 8–16.

(a) Changed locations of polling places come within § 5 since such changes may affect one's ability to vote and may have a racially discriminatory purpose or effect. Pp. 8–9.

(b) Changes in boundary lines through annexations, by determining who may vote in city elections through inclusion of certain voters, by diluting the weight of the votes of those who had the franchise prior to annexation, and with the great potential for racial discrimination in voting, clearly come within the scope of § 5. Pp. 9–14.

(c) The change from ward to at-large election of aldermen comes within the purview of § 5 since the procedure *in fact* "in force or effect" on November 1, 1964, was the election of aldermen by wards. Pp. 14–16.

3. The appropriate remedy should be determined by the District Court after hearing the views of the parties. Pp. 16–18.

301 F. Supp. 565, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court in which DOUGLAS, STEWART, WHITE and MARSHALL, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, in which BURGER, C. J., joined. HARLAN, J., filed a concurring and dissenting opinion. BLACK, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 46.—October Term, 1970

Ernest Perkins et al., Appellants, v. L. S. Matthews, Mayor of the City of Canton, et al.	On Appeal From the United States District Court for the Southern District of Mississippi.

[January 14, 1971]

Mr. Justice Brennan delivered the opinion of the Court.

Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, 42 U. S. C. § 1973c (1964 ed., Supp. V),[1] provides that whenever a State or political subdivision covered by the

[1] The full text of § 5 provides:

"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attor-

Act [2] shall enact or seek to administer "any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice or procedure" if the State or subdivision has not first obtained a declaratory judgment in the United States District Court for the District of Columbia that such qualification, prerequisite, standard, practice, or procedure "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or unless the chief legal officer or other appropriate official of such State or subdivision has submitted the qualification, prerequisite, standard, practice, or procedure to the Attorney General of the United States "and the Attorney General has not interposed an objection within sixty days after such submission." The question in this case is whether the city of Canton, Mississippi, was precluded by § 5 from enforcing at the 1969 elections for mayor and aldermen certain changes with respect to voting not first submitted to the Attorney General or to the District Court for the District of Columbia.

Appellants, voters and candidates for mayor or alderman, sought to enjoin the 1969 elections in this action

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ney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

[2] Mississippi and its subdivisions have been determined to be covered by the Act. 30 Fed. Reg. 9897 (August 6, 1965).

brought in the United States District Court for the Southern District of Mississippi.[3] They alleged that the requirements at the 1969 elections differed from those in effect on November 1, 1964, and at the last mayoral and aldermanic elections in 1965 because of (1) changes in locations of the polling places, (2) changes in the municipal boundaries through annexations of adjacent areas which enlarged the number of eligible voters,[4] and (3) a change from ward to at-large election of aldermen. The city of Canton, they alleged, sought to enforce these changes without first submitting them to the Attorney General or obtaining a declaratory judgment under § 5. Pending the convening of the court of three judges required by § 5, a single judge temporarily restrained the elections, which were originally scheduled for the spring of 1969. The three-judge court, however, after hearing, dissolved the temporary injunction and dismissed the complaint. 301 F. Supp. 565 (1969). The elections were then held in October 1969 with the chal-

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[3] "[A]n individual may bring a suit for declaratory judgment and injunctive relief, claiming that a state requirement is covered by § 5, but has not been subjected to the required federal scrutiny." *Allen* v. *State Board of Elections*, 393 U. S. 544, 561 (1969). We construed the statute to require such a suit to be heard by a three-judge court. *Ibid.*

[4] Appellants alleged that prior to the Voting Rights Act of 1965, less than 200 black citizens of Canton were qualified electors. At the trial of this lawsuit, one of the appellants testified that there were approximately 3,050 registered black electors and 2,850 white electors, for the 1969 election. Based on an average index of two voters per residence, the District Court concluded that the 1969 figures included approximately 82 black voters and 176 white voters from the annexations in this case. The annexations in this case also increased the land area of the city by approximately 50% and required the boundaries of all four election wards to be changed to conform to the new city limits.

lenged changes in effect.[5] We noted probable jurisdiction. 397 U. S. 903 (1970). We reverse.

I

The three-judge court misconceived the permissible scope of its inquiry into appellants' allegations. Our decision in *Allen* v. *State Board of Elections*, 393 U. S. 544 (1969), handed down two months before this action was instituted, settled that question. The inquiry should have been limited to the determination whether "a state requirement is covered by § 5, but has not been subjected to the required federal scrutiny." *Id.*, at 561. *Allen* held explicitly "[t]he only issue is whether a particular state enactment is subject to the provisions of the Voting Rights Act, and therefore must be submitted for approval before enforcement." *Id.*, at 558–559. For emphasis, we added:

> "It is important to distinguish the instant cases from those brought by a State seeking a declaratory judgment that its new voting laws do not have a discriminatory purpose or effect. . . . In the latter type of cases the substantive questions necessary for approval (*i. e.*, discriminatory purpose or effect) are litigated, while in the cases here decided *the only question is whether the new legislation must be submitted for approval.*" *Id.*, at 555–556 n. 19 (emphasis supplied).

The single judge who first acted in this case before the three-judge court was convened recognized that *Allen* so

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[5] The municipal primary elections were originally scheduled for May 13 and 20, 1969, and the municipal general elections for June 3, 1969. The primary elections were actually held October 7 and 14, and the general election October 28, 1969, after the three-judge court dissolved the temporary injunction.

limited the inquiry. In his unreported oral opinion granting temporary relief, he correctly stated:

> "The only questions to be decided by . . . the three judge court to be designated, is whether or not the State of Mississippi or any of its political subdivisions have acted in such a way as to cause or constitute a voting qualification or prerequisite to voting or standard, practice or procedure with respect to voting within the meaning of Section 5 of the Voting Rights Act of 1965, which changed the situation that existed as of November 1, 1964; and whether or not prior to doing so the City had filed a request for declaratory judgment with the United States District Court for the District of Columbia or asked the approval of the Attorney General of the United States. . . ."

He correctly observed further that, although there was no proof that the challenged annexations which changed the city's boundaries were made for the purpose of denying anyone any voting right or any right guaranteed by the Fourteenth or Fifteenth Amendments, "the case of *Allen* v. *State Board of Elections* held that it is not the function or prerogative of this Court, even if it were now sitting as a three judge court, to determine the motive of the City in extending its boundary." For *Allen* had explicitly held that, as between the United States District Court for the District of Columbia and other district courts "Congress intended to treat 'coverage' questions differently from 'substantive discrimination' questions," 393 U. S., at 559, and therefore: ". . . we do not consider whether this change has a discriminatory purpose or effect." 393 U. S., at 570. This is not to say that a district court limited to deciding a "coverage" question should close its eyes to the congressional pur-

pose in enacting § 5—to prevent the institution of changes which might have the purpose or effect of denying or abridging the right to vote on account of race or color, for Congress meant to reach "the subtle, as well as the obvious state regulations . . ." which may have that effect. 393 U. S., at 565. What is foreclosed to such district court is what Congress expressly reserved for consideration by the District Court of the District of Columbia or the Attorney General—the determination whether a covered change does or does not have the purpose or effect "of denying or abridging the right to vote on account of race or color."

The single judge made the limited examination of the claims concerning boundary extensions and selection of polling places permitted by *Allen* and, on the basis of preliminary findings that both were required to be submitted under § 5, granted the temporary injunction.* But the three-judge court (which included the single judge) did not adhere to *Allen*'s holding. As we read the opinion of the three-judge court, the challenged changes were examined on the merits to determine whether they had "a discriminatory purpose or effect." This emerges with particular clarity in the court's consideration of the annexations. Canton's failure to obtain prior approval of the annexations was held not to violate the Act on the express ground that ". . . the black voters still had a majority of not less than 600 after the expansions were effected." 301 F. Supp., at 567. Similarly, in considering the change from ward to at-large election of aldermen, as provided by a 1962 Mississippi statute, Miss. Code Ann. § 3374-36 (1965 Supp.), the court remarked, "Since a majority of the voters in Canton are black it is equally true that

* The claim concerning the change from ward to at-large election of aldermen was added by amendment.

under the 1962 Act the black voters have the power, if they wish to be influenced by race alone to elect an all-black governing body." *Id.*, at 568.

It is true that the three-judge court disclaimed reliance on lack of discriminatory effect as the basis for its holding that the change from ward to at-large election of aldermen was not covered by § 5; the court stated that its decision rested on the fact that the 1962 law antedated the Voting Rights Act of 1965 and should be complied with "regardless of whether [the city] complied in 1965." *Ibid.* It is further true that in finding "no merit" in the challenge to the relocation of the polling places, the court based the holding on proofs that "[t]he changes were made necessary because one place did not have space for voting machines, two others had to be moved because they had been situated on private property (bank lobbies) and permission to use the space had been withdrawn, and another was moved out of the courthouse to a school building because facilities were more ample and the move eliminated any interference with sessions of the various courts sitting at the courthouse." *Ibid.* Nevertheless, these considerations, so far as relevant, are relevant only to the questions reserved by § 5 for consideration by the Attorney General of the United States or the District Court for the District of Columbia.

However, in the interest of judicial economy, we shall not remand to the District Court for the making of a properly limited inquiry. The record is adequate to enable us to decide whether the challenged changes should have been submitted for approval, and we shall, therefore, decide that question.

II

We held in *Allen* that Congress intended that the Act be given "the broadest possible scope" to reach "any

state enactment which altered the election law of a covered State in even a minor way." 393 U. S., at 566–567. "It is significant that Congress chose not to include even . . . minor exceptions [*e. g.*, changing from paper ballots to voting machines] in § 5, thus indicating that all changes, no matter how small, be subjected to § 5 scrutiny." *Id.*, at 568. Tested by that standard, each of the three changes challenged in this case falls within § 5, if not as a "voting qualification or prerequisite to voting," at all events as a "standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964."

Even without going beyond the plain words of the statute, we think it clear that the location of polling places constitutes a "standard, practice or procedure with respect to voting." The abstract right to vote means little unless the right becomes a reality at the polling place on election day. The accessibility, prominence, facilities, and prior notice of the polling place's location all have an effect on a person's ability to exercise his franchise. Given § 5's explicit concern with both the purpose and the effect of a voting "standard, practice or procedure," the location of polling places comes within the section's coverage. Moreover, the legislative history provides ample support for the conclusion that Congress intended § 5 to cover a change in polling places. Before the Senate Judiciary Committee, the Attorney General explicitly testified that a change in "the place of registration" and a change "from a paper ballot to a machine" were changes of the kind that § 5 was designed to reach.[7] Plainly the relocation of the polling places

[7] "The Chairman: I say, is it not a fact that the keystone of this situation is that these changes in procedures that we are talking about, like changing from a paper ballot to a machine, may not

is precisely the same kind of change. Moreover, there inheres in the determination of the location of polling places an obvious potential for "denying or abridging the right to vote on account of race or color." 79 Stat. 439, 42 U. S. C. § 1973c. Locations at distances remote from black communities or at places calculated to intimidate blacks from entering, or failure to publicize changes adequately might well have that effect. Consequently, we think it clear that § 5 requires prior submission of any changes in the location of polling places.

Changing boundary lines by annexations which enlarge the city's number of eligible voters also constitutes the change of a "standard, practice, or procedure with respect to voting." Clearly, revision of boundary lines has an effect on voting in two ways: (1) by including certain voters within the city and leaving others outside, it determines who may vote in the municipal election and who may not; (2) it dilutes the weight of the votes of the voters to whom the franchise was limited before the annexation, and "the right of suffrage can be denied by a debasement or dilution of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds* v. *Sims*, 377 U. S. 533, 555 (1964). Moreover, § 5 was designed to cover changes having a potential for racial discrimination in voting, and such potential inheres in a change in the composition of the electorate affected by an annexation; *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), provides a clear-

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likely have the effect of denying or abridging rights guaranteed by the 15th amendment?

"Mr. Katzenbach: . . . Even in a sense a most innocent kind of law, as our experiences have indicated time and time again, can be used. You change the place of registration, for instance."

Hearings on H. R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess. 62 (1965).

cut illustration of the potential of boundary changes for "denying or abridging the right to vote on account of race or color." In addition, based on the findings of an 18-month study of the operation of the Voting Rights Act by the United States Civil Rights Commission, the Commission's director reported to Congress that gerrymandering and boundary changes had become prime weapons for discriminating against Negro voters:

> "The history of white domination in the South has been one of adaptiveness, and the passage of the Voting Rights Acts and the increased black registration that followed has resulted in new methods to maintain white control of the political process.
>
> For example, State legislatures and political party committees in Alabama and Mississippi have adopted laws or rules since the passage of the Act which have had the purpose or effect of diluting the votes of newly enfranchised Negro voters. These measures have taken the form of switching to at-large elections where Negro voting strength is concentrated in particular election districts, facilitating the consolidation of predominantly Negro and predominantly white counties, and redrawing the lines of districts to divide concentrations of Negro voting strength." Hearings on Voting Rights Act Extension before Subcommittee No. 5 of the House Judiciary Committee, 91st Cong., 1st Sess. 17 (1969) (remarks of Mr. Glickstein).[8]

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[8] One Congressman who had supported the 1965 Act observed, "When I voted for the Voting Rights Act of 1965, I hoped that 5 years would be ample time. But resistance to progress has been more subtle and effective than I thought. A whole arsenal of racist weapons has been perfected. Boundary lines have been gerrymandered, elections have been switched to an at-large basis, counties have been consolidated, elective offices have been abolished where blacks had a chance of winning, the appointive process

In *Fairley* v. *Patterson*, 393 U. S. 544 (1969), a companion case to *Allen*, this Court held that § 5 applied to a change from district to at-large election of county supervisors on the ground that

> "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. See *Reynolds* v. *Sims*, 377 U. S. 533, 555 (1964)." 393 U. S., at 569.

MR. JUSTICE HARLAN's opinion in that case accurately recognized that the Court's holding rested on its conclusion that "Congress intended to adopt the concept of voting articulated in *Reynolds* v. *Sims*, 377 U. S. 533 (1964), and protect Negroes against a dilution of their voting power." *Fairley* v. *Patterson*, *supra*, at 588. In terms of dilution of voting power, there is no difference between a change from district to at-large election and an annexation which changes both the boundaries and ward lines of a city to include more voters. We follow *Fairley* and hold that § 5 applies to the annexations in this case.

Our conclusion that both the location of the polling places and municipal boundary changes come within § 5 draws further support from the interpretation followed by the Attorney General in his administration of the statute. "[T]his Court shows great deference to the interpretation given the statute by the officers or agency

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has been substituted for the elective process, election officials have withheld the necessary information for voting or running for office, and both physical and economic intimidation have been employed.

"Section 5 was intended to prevent the use of most of these devices. But apparently the States rarely obeyed the mandate of that section, and the Federal Government was too timid in its enforcement." Hearings on Voting Rights Extension before Subcommittee No. 5 of the House Judiciary Committee, 91st Cong., 1st Sess. 3–4 (1969) (remarks of Rep. McCulloch).

charged with its administration." *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965). The Attorney General's interpretation was recently reported by officials of the Department of Justice in testimony related to the extension of the 1965 Act.[9] They testified that the Department regarded relocating polling places and annexing territory [10] as fall-

[9] Congress has extended the life of the 1965 Act, including § 5, from 1970 to 1975. Voting Rights Act Amendments of 1970, Pub. L. 91–285, 84 Stat. 314.

[10] In its *amicus* brief filed in this Court in *Fairley* v. *Patterson*, 393 U. S. 544 (1969), the Government took the position that § 5 applied to "laws [that] substantially change the constituency of certain elected officials . . . . There is surely no doubt that today the right to vote can be curtailed as effectively by an impermissible demarcation of an elected official's contituency as by the destruction of ballots or the refusal to permit access to the voting booth." Memorandum for the United States as *amicus curiae*, at 13. While the Government was arguing there that § 5 reached a change from ward to at-large elections, its interpretation is equally germane to the boundary annexations in the present case. MR. JUSTICE HARLAN argues that the apparent clarity of the Department's position, taken before congressional committees and before this Court, is clouded by the Department's failure to challenge unsubmitted annexations in covered States. However, the Government, in its *amicus* brief in *Fairley*, specifically denied that any significance could be attributed to the Government's failure to bring suit. In arguing that § 5 applied to redistricting and reapportionment in States covered by the Act, the Government stated:

"Nor can the Attorney General's failure to [bring suit] in cases involving reapportionment and redistricting be properly viewed as undermining these Section 5 cases or refuting the clear congressional intent that that provision should be given broad scope. The most that can be assumed from past silence is that the Attorney General was not prepared to interpose an objection to the changes being effected . . . ." Memorandum for the United States as *amicus curiae*, *supra*, at 22.

Moreover, there is no indication that the Attorney General or other Justice Department officials were aware of the boundary changes referred to in the dissenting opinion; no mention of them appears in any of the extensive congressional materials on the Justice Department's enforcement activities under § 5, submitted to Congress

ing within the Act. Their testimony also indicated that this interpretation was accepted by at least some affected States and political subdivisions, which had submitted such changes for the Attorney General's approval. Hearings on Amendments to the Voting Rights Act of 1965 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 91st Cong., 1st and 2d Sess. 248, 506 (1969, 1970).

In support of this testimony, the Justice Department submitted a formal table showing the 313 changes in laws with respect to voting which had been submitted to the Attorney General and acted upon by him between 1965 and 1969. The Department divided its responses to these submissions into three categories: (1) changes which the Department did not consider within the scope of § 5; (2) changes which the Department considered within the scope of § 5, but to which the Department did not object; and (3) changes within the scope of § 5 to which the Department objected as discriminatory. Every change

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in relation to the recent extension of the Act from 1970 to 1975. Hearings on Amendments to the Voting Rights Act of 1965 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 91st Cong., 1st and 2d Sess. 248, 506 (1969, 1970); Hearings on Extension of the Voting Rights Act before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess. (1969). Finally, attributing significance to any apparent failure of the Government to act is particularly hazardous in this case. Section 5 was enacted in large part because of the acknowledged and anticipated inability of the Justice Department—given limited resources—to investigate independently all changes with respect to voting enacted by States and subdivisions covered by the Act. See n. 13, *infra*. For that reason, § 5 places the burden on the affected polities to submit all changes for prior approval. That the Department may have been unable to discover and investigate changes not reported to it should not, in these circumstances, be surprising, and does not cast any serious doubt on explicit official statements of the Department's interpretation of the statute.

in boundary or election district lines [11] as well as every change in polling places shown in that table was considered by the Department to be within the scope of § 5. Hearings on Voting Rights Act Extension before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess. 308–313 (1969).

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[11] The table reflects the fact that only South Carolina has complied rigorously with § 5. Through June 1969, it submitted 252 changes for approval, including all three annexations (and one consolidation) which were approved by the state legislature between 1965 and 1969. No political subdivisions of South Carolina, however, submitted any changes on their own initiative. Georgia and its subdivisions had submitted 60 changes for approval, including one annexation, one consolidation of election districts, and two changes in the lines of election districts. It is true that the Georgia Sessions Laws reflect numerous annexations which were not submitted to the Attorney General. It is also true that the Georgia Sessions Laws reflect at least an equal number of changes, obviously covered under any interpretation of § 5, which were also not submitted. For example, in 1965, the Georgia State Legislature enacted the following acts, each applicable to one municipality, which were not submitted to the Attorney General: four acts changing voter qualifications in municipal elections, three acts changing municipal elections from paper ballots to voting machines, four acts completely revising municipal election codes, and two acts requiring a majority vote, instead of a plurality, for election of city officials. In 1968, the Georgia State Legislature enacted the following acts, each applicable to one municipality, which were not submitted to the Attorney General: seven acts changing the dates of municipal elections and increasing the terms of municipal officials, one act creating a voter residency requirement and an oath to be taken by all voters, one act changing the number of aldermen and requiring a majority vote for election of aldermen, one act changing voter qualifications, and one act completely revising a municipal election code. Nor is this an exhaustive list even for those two years. The remaining four States covered by the Act—Mississippi, Alabama, Louisiana, and Virginia—have submitted a combined total of 33 changes. The only conclusion to be drawn from this unfortunate record is that only one State is regularly complying with § 5's requirement.

The change from ward to at-large elections of all aldermen was of course a change within the coverage of the Act. *Fairley* v. *Patterson, supra,* is dispositive of that question. However, the question arises in this case in a peculiar context. The change to at-large elections was mandated by a Mississippi statute enacted in 1962. But Canton ignored the mandate in the conduct of the 1965 municipal elections and, as in 1961, elected aldermen by wards.[12] Canton now argues that it had no choice but to comply with the 1962 statute in the 1969 elections.

We have concluded, nevertheless, that the change to at-large elections required federal scrutiny under § 5. That section in express terms reaches any standard, practice, or procedure "different from that in force and effect on November 1, 1964." In our view, § 5's reference to the procedure "in force and effect on November 1, 1964," must be taken to mean the procedure which would have been followed if the election had been held on that date. That judgment is necessarily a matter of inference in this case since Canton did not hold a munipical election on November 1, 1964. But in drawing that inference, there is little reason to blind ourselves to relevant evidence in the record by restricting our gaze to events which occurred before that date. Ordinarily we presume that officials will act in accordance with law. See *First National Bank of Albuquerque* v. *Albright,* 208 U. S. 548, 553 (1908). If the only available facts showed that Canton conducted its 1961 election by wards but that the Mississippi Legislature had subsequently enacted a statute in 1962 requiring future municipal elections to be held at large, Canton officials would be entitled to the weight of that presumption.

[12] The reason for Canton's failure to conform its election to state law does not appear in the record. On oral argument, appellee's counsel stated that the lapse was due to his overlooking the 1962 law.

With the benefit of hindsight, however, we know that Canton elected its aldermen by wards in its June 1965 municipal election. The record reflects no relevant change between November 1964 and June 1965 to suggest that a different procedure would have been in effect if the elections had been held seven months earlier. Consequently, we conclude that the procedure *in fact* "in force or effect" in Canton on November 1, 1964, was to elect aldermen by wards. That sufficed to bring the 1969 change within § 5. As was the case in *Allen*, "It is clear, however, that the new procedure with respect to voting is different from the procedure in effect when . . . [Canton] . . . became subject to the Act . . . ." 393 U. S., at 570. The bearing of the 1962 statute upon the change was for the Attorney General or the District Court for the District of Columbia to decide.

III

The appellants have urged that, in addition to reversing the District Court judgment, the Court should set aside the elections held in October 1969, and order new elections held forthwith in which the changes challenged in this case may not be enforced. In *Allen* we declined a like invitation and gave that decision only prospective effect, primarily because the scope of § 5 coverage was then an issue of first impression and "subject to rational disagreement." 393 U. S., at 572. That reasoning is inapplicable in this case since *Allen* was decided two months before the originally scheduled dates of the Canton elections.

In arguing for new elections, appellants emphasize the desire of Congress to ensure that States and subdivisions covered by the Act not institute new laws with respect to voting that might have a racially discriminatory purpose or effect. On the basis of the legislative history, there is little question that Congress sought to achieve this

goal by relying upon the voluntary submission by affected States and subdivisions of all changes in such laws before enforcing them. Failure of the affected governments to comply with the statutory requirement would nullify the entire scheme since the Department of Justice does not have the resources to police effectively all the States and subdivisions covered by the Act, see *Allen*, 393 U. S., at 556, and since private suits seem unlikely to sufficiently supplement federal supervision. Moreover, based upon ample proof of repeated evasion of court decrees and of extended litigation designed to delay the implementation of federal constitutional rights, Congress expressly indicated its intention that the States and subdivisions, rather than citizens seeking to exercise their rights, bear the burden of delays in litigation.[13]

At the same time, we recognize that, in determining the appropriate remedy, other factors may be relevant, such as the nature of the changes complained of, and whether it was reasonably clear at the time of the election that the changes were covered by § 5. In certain circumstances, for example, it might be appropriate to enter an order affording local officials an opportunity to seek federal approval and ordering a new election only if local officials fail to do so or if the required federal approval is not forthcoming. Since the District Court is more familiar with the nuances of the local situation than are we, and has heard the evidence in this case, we think the question of the appropriate remedy is for that

[13] *E. g.*, Hearings on H. R. 6400 before Subcommittee No. 5 of the House Judiciary Committee, 89th Cong., 1st Sess. 60, 72 (1965); Hearings on S. 1564 before the Senate Judiciary Committee, 89th Cong., 1st Sess. 14–17 (1965); 111 Cong. Rec. 10727 (1965) (remarks of Senator Tydings); *id.*, at 15645, 15648 (remarks of Rep. Celler); *id.*, at 16221 (remarks of Rep. Corman). Opponents of the Act also recognized the severity of § 5's requirements. *E. g.*, *id.*, at 10725 (remarks of Senator Talmadge); *id.*, at 15657 (remarks of Rep. Willis).

court to determine, in the first instance, after hearing the views of both parties.[14]

The judgment of the District Court is reversed, and the case is remanded to that court with instructions to issue injunctions restraining the further enforcement of the changes until such time as the appellees adequately demonstrate compliance with § 5, and for further proceedings consistent with this opinion.

It is so ordered.

[14] We add only one restriction: If the District Court decides that a new election is required, Canton should be permitted to enforce any changes at the new election for which it can obtain federal approval.

SUPREME COURT OF THE UNITED STATES

No. 46.—October Term, 1970

Ernest Perkins et al., Appellants, *v.* L. S. Matthews, Mayor of the City of Canton, et al.	On Appeal From the United States District Court for the Southern District of Mississippi.

[January 14, 1971]

Mr. Justice Blackmun, with whom The Chief Justice joins, concurring.

Given the decision in *Allen* v. *State Board of Elections*, 393 U. S. 544 (1969), a case not cited by the District Court, I join in the judgment of reversal and in the order of remand.

SUPREME COURT OF THE UNITED STATES

No. 46.—October Term, 1970

Ernest Perkins et al., Appellants, *v.* L. S. Matthews, Mayor of the City of Canton, et al.	On Appeal From the United States District Court for The Southern District of Mississippi.

[January 14, 1971]

Mr. Justice Harlan, concurring in part and dissenting in part.

Our role in this case, as the Court correctly recognizes, is limited to determination whether § 5 of the Voting Rights Act of 1965, 42 U. S. C. § 1973c, required the city of Canton to obtain federal approval of the way it proposed to run its 1969 elections. For this reason, I am unable to join the dissenting opinion of Mr. Justice Black, *post*, p. —, although like him I see little likelihood that the changes here involved had a discriminatory purpose or effect.

I agree with the Court, and for substantially the reasons it gives, that the city should have submitted the relocation of polling places for federal approval. But I cannot agree that it was obliged to follow that course with respect to the other two matters here at issue.

I

Whether or not Congress could constitutionally require a State to submit all changes in its laws for federal approval, cf. *South Carolina* v. *Katzenbach*, 383 U. S. 301, 358–362 (1966) (Black, J., dissenting), the Voting Rights Act does not purport to do so. Section 5 requires submission of changes "with respect to voting" only.

The Court seems to interpret this restriction as including any change in state law which has an effect on voting, if changes of that type have "a potential for racial discrimination in voting." *Ante*, p. —. The limitation implied by the latter clause will prove meaningless as a practical matter. Given a change with an effect on voting, a set of circumstances may be conceived with respect to almost any situation in which the change will bear more heavily on one race than on another. In effect, therefore, the Court requires submission of any change which has an effect on voting. I think it plain that the statutory phrase—"with respect to voting"—was intended to have more limited compass.

The legislative history of the Voting Rights Act was examined in the majority and dissenting opinions in *Allen* v. *State Board of Elections*, 393 U. S. 544, 564–571, 588–591 (1969). No useful purpose would be served by retraversing ground covered there. The Court concluded from its review of the history that § 5 was "intended to reach any state enactment which altered the election law of a covered State in even a minor way." *Id.*, at 566. The Court's opinions in both *Allen* and this case are devoid of evidence of a legislative intent to go beyond the State's election law and to reach matters such as annexations, which affect voting only incidentally and peripherally. *Fairley* v. *Patterson*, decided with *Allen*, and the remarks of the Solicitor General in his *amicus* brief in that case are plainly distinguishable on this basis. At least in the absence of a contrary administrative interpretation, I would not go beyond *Allen* to hold that annexations are within the scope of § 5. The Court's assertion that the Attorney General does in fact interpret the Act differently seems to me to give too much weight to the passing remark of an Assistant Attorney General.

Cf. *Allen* v. *State Board of Elections*, 393 U. S., at 568–569.[1]

II

Fairley v. *Patterson* held that a change from election by districts to election at large was within the scope of § 5. The question for determination here is which of the two procedures was "in force or effect on November 1, 1964." The Court interprets the quoted phrase to mean the procedure which probably would have been followed if an election had been held on the crucial date, regardless of the provisions of controlling state law. While this interpretation is not wholly unreasonable, I find it unlikely that it is the one Congress would have preferred if it had thought about the problem. Resolution of the hypothetical factual question required by the Court's test would be quite inconvenient, if not unmanageable, for the Attorney General or the District Court for the District of

[1] The fact that the Attorney General has expressed his opinion on the merits of the handful of border changes which have been presented to him, rather than dismissing them as not within the scope of § 5, seems to me to be entitled to little weight in the face of the enormous number of annexations which have not been submitted to him and which he has done nothing about. In the fiscal year beginning July 1, 1967, there were over 40 municipal annexations in South Carolina. 1967–1968 Report of the Secretary of State of South Carolina 165–166. None of these were submitted for the approval of the Attorney General. Hearings on Extension of the Voting Rights Act before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess., 310–312 (1969). The Georgia Session Laws for the years 1965 to 1969 reveal over 100 boundary changes in Georgia cities. Only one was submitted to the Attorney General, and that one also involved redrawing of ward lines. So far as the face of the statute, Act of March 2, 1966, No. 235, 1966 Ga. Laws 2729, reveals, the redrawing of ward lines may have completely altered the political map of the city. In the case at hand, the old ward lines were simply extended to the new city limits.

Columbia, far from the scene.[2] Moreover, under the Court's test, results may turn on the seeming fortuity that in the first election after November 1, 1964, local officials forgot about a controlling statute of statewide application and no private citizen brought suit to have the election set aside. Barring state attempts to resurrect long-ignored statutes, I would interpret "procedure . . . in force or effect on November 1, 1964," to mean the procedure required by state law. Under this interpretation I would hold that the change from election by wards to election at large occurred on the effective date of the 1962 state statute, and therefore that it did not require approval under § 5.

III

I must confess that I am somewhat mystified by the Court's discussion of the appropriate remedy in this case. For the reasons set out in my partial dissent in *Allen*, 393 U. S., at 593–594, I would direct the holding of new elections if and only if the city fails to obtain approval from the appropriate federal officials within a reasonable time. If such approval is forthcoming, I see no justification for requiring a rerun of the 1969 elections. See the opinion of MR. JUSTICE BLACK, *post*, p. —. If the approval is not forthcoming, the fact of violation of the federal statute, as interpreted by this Court, and the

[2] Assuming that the statute requires determination of this hypothetical factual question, I would have thought that it should be passed on by the District Court in the first instance. The record is simply too sparse to reveal why the 1962 statute was not followed in 1965, or whether the same cause would have been operative a year earlier. If the defendants are not entitled to prevail on the theory that the plaintiffs failed to come forward with adequate proof of the procedure in force or effect in 1964, they are at least entitled to a hearing at which they may address themselves to the issue.

possibility that the changes had a discriminatory purpose or effect seem to me to require new elections in the absence of exceptional circumstances which I cannot now foresee. In any event, the District Court is entitled to more guidance on this score than the Court provides.

SUPREME COURT OF THE UNITED STATES

No. 46.—October Term, 1970

Ernest Perkins et al., Appellants, *v.* L. S. Matthews, Mayor of the City of Canton, et al.	On Appeal From the United States District Court for the Southern District of Mississippi.

[January 14, 1971]

Mr. Justice Black, dissenting.

In *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966), this Court upheld the Voting Rights Act of 1965 as a legitimate exercise of congressional power to enforce the provisions of the Fifteenth Amendment. I agreed with the majority that Congress had broad power under § 2 of the Fifteenth Amendment to enforce the ban on racial discrimination in voting. However, I dissented vigorously from the majority's conclusion that every part of § 5 of the Voting Rights Act was constitutional. The fears which participated my dissent in *Katzenbach* have been fully realized in this case. The majority, relying on *Katzenbach*, now actually holds that the City of Canton, Mississippi, a little town of 10,000 persons, cannot change four polling places for its election of aldermen without first obtaining federal approval.

Section 5 of the Voting Rights Act provides that no political subdivision subject to the Act may adopt any voting law or election practice different from that in effect on November 1, 1964, without first going all the way to Washington to submit the proposed change to the United States Attorney General or to obtain a favorable declaratory judgment from the United States Dis-

trict Court for the District of Columbia.[1] I have stated my belief in dissents in *Katzenbach* and *Allen* v. *State Board of Elections*, 393 U. S. 544 (1969), that this section of the Voting Rights Act of 1965 violates the United States Constitution because it deprives a few States and their political subdivisions of the power to make their own laws and govern themselves without advance federal approval. Under our Constitution as the Founding Fathers drafted it and as the people have adopted and amended it, I believe the power of the States to initiate and enforce their own laws cannot be so easily taken away.

This case poignantly demonstrates the extent to which the Federal Government has usurped the function of local government from the local people to place it in the hands of the United States District Court for the District of Columbia and the United States Attorney General, both of which are over a thousand miles away from Canton, Mississippi. The last election for aldermen in the City of Canton before the one here in issue was held in 1965. If the procedures used in the 1965 election had been used in the 1969 election, four of the five aldermen would have been elected from wards. In two of these wards white voters were in a majority and in the other two black voters were in a majority. One alderman would have been elected at large. The city adopted three changes for the 1969 elections. Detailed consideration of these changes shows that they pertained solely to local concerns in which the National Government has no proper interest and did not involve racial discrimination.

Polling Places.—The city altered four of the local polling places. Two were moved because the old polling places had been located on private property and the owners would no longer consent to the use of their prop-

[1] Voting Rights Act of 1965, § 5, 42 U. S. C. § 1973c.

erty for voting. I find it incredible to believe that Congress intended that the people of Canton would have to travel to Washington to get the Attorney General's consent to rent new polling places. Another polling place was moved because the old one did not have sufficient space to accommodate voting machines. Finally, the fourth place was moved from a courthouse to a public school to eliminate interference with courtroom proceedings. It is difficult for me to imagine a matter more peculiarly and exclusively fit for local determination than the location of polling places for the election of town aldermen. Nor is there the slightest indication that any of these changes were motivated by or resulted in racial discrimination. The United States District Court unanimously agreed on undisputed evidence that the appellants' attack on the changes in polling places had "no merit."[2] Yet, the majority of this Court has now decided that the City of Canton cannot move its polling places without first submitting the proposed change to the politically appointed Attorney General or a District Court over a thousand miles away. Presumably, the majority is ready to hold, if necessary, that the City of Canton could not change from ballots to voting machines without obtaining similar federal approval. I dissent from any such utter degradation of the power of the States to govern their own affairs.

Boundary Extensions.—The majority also finds that Canton violated the Act by making three separate extensions of the City's boundaries between 1965 and 1969. The 1965 extension of the city limits added 46 Negro voters to the voter registration roles. *That annexation added no white voters.* The 1966 annexation added 28 black voters and 187 white voters. The 1968 annexation added eight black voters and 144 white voters. In sum the three additions added 92 black voters and 331 white

[2] 301 F. Supp., at 568.

voters. These figures must be viewed in relation to the voting population of the city on January 12, 1969, when there were 2,052 white voters and 2,794 Negro voters.[3] It is apparent that even if these 1969 figures included no voters from the annexed areas, the additions would not alter the racial balance of voters in Canton. Moreover, it is undisputed that at the time of the election in question an absolute majority of the voters in Canton were black. Finally, the District Court found that the annexations were not part of "a stratagem deliberately designed to overturn a black majority at the municipal polls."[4]

In my view, the Constitution prohibits the Federal Government from requiring federal approval of state laws before they can become effective. Proposals for such congressional veto power over state laws were made at the Constitutional Convention and overwhelmingly rejected.[5] The Fourteenth Amendment did not alter the basic structure of our federal system of government. The Fourteenth Amendment did bar discrimination on account of race and did give the Federal Government power to enforce the ban on racial discrimination. In this case the Congress has attempted to enforce the ban on racial discrimination by requiring the States to submit their laws or practices to federal approval even before they are initiated. In my view that requirement attempts to accomplish the constitutional end of banning racial discrimination by a means—requiring submission of proposed state laws to the Attorney General—that violates the letter and the spirit of the Constitution. But here the Court goes even further: It permits the

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[3] *Id.*, at 566–567.

[4] *Id.*, at 567.

[5] See Debates in the Federal Convention of 1787 as reported by James Madison in Documents Illustrative of the Formation of the Union of American States (1927), pp. 605, 789, 856.

use of an unconstitutional means in a case where the *parties have not shown racial discrimination.*

At-Large Elections.—In 1962, before Congress enacted the Voting Rights Act of 1965, Mississippi passed a state statute requiring cities to conduct all elections for aldermen by having all candidates run at large.[6] For some reason not revealed in the record, the City of Canton failed to comply with that law in the 1965 elections for aldermen. The majority now holds that because Canton violated Mississippi law in the 1965 elections, the city must violate the same law again in future elections unless the officials of Canton secure federal permission to abide by the admittedly valid law of their State.

In my view Congress did not intend and the Constitution does not permit such a perversion of our federal system of government. Nor can the majority support its unprecedented decision on the grounds of racial discrimination. It is beyond my comprehension how the change from wards to an at-large election can discriminate against Negroes on account of their race in a city that has an absolute majority of Negro voters.

One vice of § 5 is that it attempts to shortcut the Federal Government's job in policing racial discrimination in voting by radically curtailing the power of certain States to conduct their own elections while leaving other States wholly free of any such restraint. Moreover, § 5

[6] Chapter 537 of the Laws of Mississippi of 1962, provides:

"All aldermen shall be selected by vote of the entire electorate or the municipality. Those municipalities which determine to select one alderman from each ward shall select one of the candidates for alderman from each particular ward by a majority vote of the entire electorate of the municipality."

A strong argument can be made that this statute was "procedure with respect to voting . . . in force or effect on November 1, 1964," in which case the officials of Canton were prohibited by the Voting Rights Act from *not enforcing* it absent federal approval.

is unnecessary to the enforcement of the Voting Rights Act and can only serve to cause irritation and pernicious divisiveness in those States to which it applies. When Mississippi or any other State abridges the rights of citizens on account of race, the proper course for the United States is to institute suit in a federal court to have the discriminatory practice halted. Of course, in such proceedings, the state statute or practice is presumed valid, and it is up to the Attorney General to prove that the challenged act or practice is discriminatory. *Only after discrimination has been established* does the Federal Government have the power under the Fourteenth Amendment and the Supremacy Clause to interfere with the State's conduct of its own affairs.

This Act attempts to reverse the proper order of things. Now the Congress presumes—a presumption which the Court upholds—that state statutes regulating voting are discriminatory and enjoins their enforcement until the State can convince distant federal judges or politically appointed officials that the statute is not discriminatory. This permits the Federal Government to suspend the effectiveness or enforcement of a state act *before* discrimination is proved. But I think the Federal Government is without power to suspend a state statute before discrimination is proved. The inevitable effect of such a reversal of roles is what has happened in this case—a nondiscriminatory state practice or statute is voided wholly without constitutional authority.

Except as applied to a few southern States in a renewed spirit of Reconstruction, the people of this country would never stand for such a perversion of the separation of authority between state and federal governments. Never would New York or California be required to come begging to the City of Washington before they could enforce the valid enactments of their own legislatures. Never would this law have emerged from

congressional committee had it applied to the entire United States. Our people are more jealous of their own local governments than to permit such a bold seizure of their authority.[7]

Finally, I dissent from the remedy adopted by the Court. The majority adds insult to injury by remanding this case to the District Court with instructions to determine whether Canton should be required to hold a new election. This Court has always heretofore been rightly hesitant in interfering with elections even for the grossest abuses. The majority now departs from our many precedents for restraint in election cases and suggests to the District Court that it may be appropriate to invalidate the 1969 election and require the village to undergo the great expense and tremendous disruption of a new election. Such a remand of this case is inappropriate for at least two reasons. First, the majority's decision is not predicated upon any actual discrimination against voters by the city of Canton, but merely upon a failure to seek federal approval for *de minimis* changes in its election machinery. The majority does not pretend that any actual discrimination has been proven in this case. Ci-

[7] Section 5 of this Act and its enforcement by the Court is reminiscent of treatment accorded the Colonies by the British King. Some of the Colonies' complaints of July 4, 1776, were:

"He has refused his Assent to Laws, the most wholesome and necessary for the public good.—He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.—He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.—He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures. . . ." The Declaration of Independence—July 4, 1776.

tations to the finding of the United States Civil Rights Commission about past instances of racial discrimination and to statements made by Congressmen who supported the 1965 Voting Rights Act do not prove discrimination in this case. In the absence of affirmative proof of racial discrimination, I believe it would be an abuse of any remedial discretion that may be vested in the federal judiciary to compel Canton to hold a new election. Second, I believe that in remanding this case, my Brethren are neglecting their constitutional duty to decide an issue necessary to the full disposition of this case. This case has been in litigation since May, 1969 and the election has already been postponed once. By the time the majority's mandate is acted upon by the District Court and we have disposed of the jurisdictional statement which will inevitably follow, Canton's 1973 elections will be just around the corner. In this posture, to require a new election would not be a remedy for a constitutional or statutory wrong but a harsh and oppressive punishment wholly unwarranted by the facts of this case. Moreover, an order directing a new election would be a "shotgun" sanction, damaging all of the candidates and all of the people in Canton. Useless campaign expenses would have to be borne by both white and black candidates. And the town, through property or sales taxes imposed on all citizens, black or white, rich or poor, would have to collect tax money to pay the expenses of a new election. I need not remind the District Judges below that elections are expensive and that all southern towns are not rich. I am convinced that if the majority were to confront the issue of an appropriate remedy now, the Court would not void the election or compel the city to hold a new election. To the contrary, the 1969 election would be upheld because the alleged violations of the Act are so very minor and so clearly technical. We should not forget that while it is easy for judges to order

new elections, it will be neither easy nor inexpensive for the little city of Canton to comply with such an order.

For the reasons set out above and in my dissents in *South Carolina* v. *Katzenbach, supra,* and *Allen* v. *State Board of Elections, supra,* I would affirm the judgment of the United States District Court.[8]

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[8] My Brothers THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN have stated that "[g]iven the decision in *Allen* v. *State Board of Elections* . . . [they] join in the judgment" of the Court in this case. I have to admit that I do not precisely understand what they mean by "given *Allen*." Neither THE CHIEF JUSTICE nor MR. JUSTICE BLACKMUN were members of the Court when *Allen* was decided. They are certainly not bound by the Court's past mistakes if they think as I do, that *Allen* was a mistake. Yet, I do not understand that "given *Allen*," necessarily means that they now agree to what was decided in that case. I believe that *Allen* was wrongly decided and would overrule it now. Moreover, I do not believe that acceptance of the Court's decision in *Allen* necessitates compelling the city of Canton to seek the Attorney General's consent to either the changes in local polling places or the other changes at issue in this case.